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# MINNESOTA REPORTS

VOL. 79

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CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF MINNESOTA

JANUARY 24, 1900—May 25, 1900

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HENRY BURLEIGH WENZELL

REPORTER

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ST. PAUL  
FRANK P. DUFRESNE  
1901

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**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE  
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*Rec. Apr. 8, 1901.*

**JUSTICES**  
**OF**  
**THE SUPREME COURT**  
**OF MINNESOTA**

**DURING THE TIME OF THESE REPORTS**

---

**Hon. CHARLES M. START, Chief Justice.**  
**Hon. LOREN W. COLLINS.**  
**Hon. CALVIN L. BROWN.**  
**Hon. JOHN A. LOVELY.**  
**Hon. CHARLES L. LEWIS.**

---

**DARIUS F. REESE, Esq., Clerk.**

---

**ATTORNEY GENERAL,**  
**Hon. WALLACE B. DOUGLAS.**

## NOTE

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*By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.*

*By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.*

*The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in (). Of the cases in this volume those preceding the case on page 232 are from the October, 1899, term calendar, and the remaining cases are from the April, 1900, term calendar.*

*As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.*

*In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.*

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## CORRECTIONS

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*Page 209, 2d line from top, for "Laws 1899, c. 70," read "Laws 1899, c. 77."  
Page 230, 10th line from top, for "Laws 1876, c. 219," read "Laws 1876, c. 49."*

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# PROCEEDINGS

IN MEMORY OF

## ASSOCIATE JUSTICE MITCHELL.

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On the afternoon of October 2, 1900, in the chamber of the house of representatives at the state capitol, Hon. James A. Tawney presented to the supreme court, then in session, in behalf of the Winona and State Bar Associations the following memorial of Associate Justice Mitchell, who died August 21, 1900, and moved that the same be spread upon the records of the court:

### MEMORIAL.

William Mitchell, who for forty-three years was a member of the Minnesota Bar, for seven years was judge of the Third judicial district, and for nineteen years was an Associate Justice of this court, having been called away by death, the members of the Winona and state Bar respectfully submit the following as a testimonial of their esteem and affection for him while living, and as a tribute to his memory now that he is gone.

We honored him for his noble and dignified character; we loved him for his fraternal spirit. In all the relations and duties of life he aimed at what was true and pure and good. His large intellectual gifts and liberal culture gave him prominence and power. His fine social qualities, uniform courtesy, and kindness won the favor of all who knew him. His spotless integrity and conscientious fidelity in the discharge of duty won their confidence. It falls to the lot of few men to be as universally respected as was Judge Mitchell.

That he was a great lawyer and a great jurist, great in legal learning, and great in those qualities of mind and character essential to judicial eminence, is the uniform testimony of the Bar of the state. In his large and invaluable contribution to the judicial literature of the state and nation, he has shed undying lustre upon the Bar, and the courts, with which he was directly related. In losing him Minnesota has lost one of her brightest ornaments—one of her most distinguished and valuable citizens.

We ask, therefore, that this brief memorial be preserved in the records of this court, together with such other proceedings as may occur in connection therewith.

---

Hon. James A. Tawney then addressed the court as follows:

"May it please the Court:

"Having presented this Memorial I should rather leave undone that which I am about to do, were it not for the solemn debt which the living owe to the dead. Not because I do not take pleasure in acknowledging my personal debt to the distinguished dead we honor to-day; not because I do not dwell with joy upon his extraordinary virtues; nor is it because I feel that any words of mine will exaggerate the beauty of his life, and the beneficence of his influence. Not for any, or all, of these causes, do I hesitate to speak, but because he was my personal friend in that sense which makes it difficult to speak. Excepting my father, there is no living man to whom I owe so much as to Judge Mitchell.

"This tender, loving husband, father, and friend lived close to the hearts of all who knew him well, and were every one for whom he did some noble service to speak the thoughts that arise in his heart, Judge Mitchell's name would live to-day in a symphony of grateful eulogy. In the hearts of all who knew him best he will always be remembered the soul of gentility, of nobility, and manliness. He was justly esteemed as a judge, a citizen, and a man. He had strong, pure affections that bound him to his country and to his friends like bands of steel. He

"Best seem'd the thing he was, and join'd  
Each office of the social hour  
To noble manners, as the flower  
And native growth of noble mind.

\* \* \* \* \*

And thus he bore without abuse,  
The grand old name of gentleman.'

"The story of the life of William Mitchell is a simple tale of struggle and progress. He grew in purity and power of personality as he grew in influence and usefulness in the commonwealth.

Born in Canada in 1832, he was graduated from Jefferson College at Cannonsburg, Pennsylvania, in 1853; he taught two years in Morgantown Academy of West Virginia; he was admitted to the Morgantown bar in 1857. Soon thereafter he moved to Winona, Minnesota, and entered upon a successful practice, and upon a long career of public usefulness, suddenly terminated at its zenith by the touch of death. He was elected to the second legislature of Minnesota for 1859 and 1860; he was elected county attorney for Winona county and served for one term; he also filled various other municipal offices with great credit, and was elected judge of the Third judicial district of the state in 1874 and re-elected in 1880. He was appointed to the supreme judiciary of the state by Governor Pillsbury in 1881, and for nineteen years was one of the central figures of this important tribunal. When the people of the state departed from the policy of a nonpartisan judiciary instituted by Governor Pillsbury, Judge Mitchell's place, in January, 1900, was filled by another, and the state lost one of its brightest minds.

"From the foothills of obscurity he rose among the mountain peaks of fame. Exquisite and yet tremendous he moved unobtrusively among men, seeking everywhere with singleness of purpose that noble realm, where, across the ages, the friends of justice and of God hold silent converse with each other and their Great Original. His parents were born and educated in a land where the heather grows over the granite, and no nobler union of sturdy principles and gracious manner ever sprang from a Scottish home

"Many men have sought by tongue and pen to express their deep sorrow at his irreparable loss, and their profound sense of his great worth, but no one, whose words I have heard or read, has noted one of the most beautiful traits of his exquisite personality—the Christian gentleness and becoming modesty of his manner.

"Judge Mitchell was a lawyer of profound scholarship. It would be difficult to portray his great legal and literary attainments, his unswerving loyalty to the principles he loved, or the justice with which he applied those principles to human life; but it would require volumes of narrative to convey any impression that would approximate the truth of the affability of his bearing, the kindness of his manner, and the charity of his life. It is not necessary in



this presence that I should dwell upon the great legal learning, or upon the fine literary ability with which he expressed his opinions and graced the literature of this court. Of all this, and more, you are profoundly assured, while others, whose knowledge and ability peculiarly qualify them, will speak. No judge ever strove more faithfully to apply the principles of truth and justice to the common contests of human life, and but few have succeeded as he did. He was a great analyzer of complex practical situations. No general saw with more unerring insight the critical moment in battle than he saw the central question at issue, whether of law or fact, in any legal controversy to which his attention was called. His thought flew to the essence of the matter like an arrow to its mark, and his heart ever turned toward justice like a planet toward its sun. He loved the problems of equity and justice as the poet loves beauty, as the philosopher loves truth, and coupling with this passion, as he did, keen powers of analysis, and a sense of logical consistency, it is not difficult to understand the peculiar judicial cast of his mind.

"To this passion for justice between man and man is traceable his patience and disinterestedness, as well as his almost unerring insight. No lawyer ever argued a case before him without feeling that Judge Mitchell listened attentively to the end. Love suffereth long and is kind, said the Great Teacher. There can be no doubt that the patience exhibited continually by great jurists, by great scientists, and great practical heroes everywhere is the immediate fruit of some disinterested passion or another. An intense interest in some impersonal thought-relation or equally impersonal idea sustains human effort, and renders men oblivious to circumstances which annoy those of less devotion.

"Judge Mitchell was a man of sound legal judgment. Men always judge soundly of that toward which they turn with intense disinterested passion. Ambition—that last infirmity of noble minds—undoubtedly stimulated, but never debased him. He devoted much time and effort to tasks which could never bring him individually any adequate return.

"My first acquaintance with him was in 1877 as a teacher of a Bible class in one of the Sunday schools of Winona. As a teacher,

a lawyer, or a judge he always took a deep interest in young men, and assisted not only me but more than one youth with whom he came in contact in this way, in the attainment of an education; but no sense of personal obligation was ever occasioned either by the fact or the manner in which his aid was thus bestowed. He served as president of infant enterprises in the city of Winona when they were too feeble to give him strength in return. He visited the sick, cared for the weak and helpless, and always displayed in all personal relations a thoughtfulness and charity rarely found in those who hold justice so dear.

"It is not possible for human eyes to see what lies beyond the grave, but this we know: That he experiences to-day the consequences, whatever they may be, of having lived justly, loved mercy, and walked humbly with his God.

"As I close a sense of my personal loss comes over me and fills me with regret. I know of no sincerer compliment which the living pay the dead than their sorrow, and as for Judge Mitchell—with all my heart I wish he were living still. There was, there is, no simpler, gentler, manlier man."

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Hon. Thomas Wilson then addressed the court as follows:

"Judge Mitchell's father was a farmer. While he and his family lived comfortably and well, they lived plainly, for that comported with their tastes and views of propriety; and, besides, they had but a limited amount of this world's goods. William was therefore early taught frugality and plain living, and he never forgot the example and lesson.

"As was usual at that time with that class of people—his parents were both natives of Scotland and Presbyterians—the clergyman was a good scholar, and he aided William to lay the foundation of his education, especially in the languages. William afterwards pursued his studies in Jefferson College, Pennsylvania. When he graduated he at once commenced the study of the law with the Honorable Edgar Wilson, a prominent lawyer of Morgantown, Virginia, and while studying law he taught some advanced classes in an academy in the same town.

"Having finished his law studies, early in 1857 he removed to Winona, where he continued to reside until he removed to this city, about eight years ago. Almost immediately on his coming to Winona, I had the good fortune to become intimately acquainted with him, and thereafter, until his death, unless one or the other was absent from home, a week rarely passed in which we did not spend more or less time together. Our intimacy was never for a moment interrupted, and happily, between our families there was also the closest friendship. While I was on the bench, he practiced before me, both in the district court and in this court. After I left the bench we very frequently met at the bar as opposing counsel, and all the while he was on the bench I practiced before him. I therefore can speak knowingly of him as a man, as a lawyer, as a judge, and as a citizen.

"Nature endowed him with much more than ordinary ability. He had a good literary education, was a thoroughly educated lawyer, and, beyond that, had wide general information. He was constantly seeking knowledge. Unlike most people, he did not take a vacation for physical rest; on the contrary, except when he was fishing, he kept going from place to place to learn what he could about the country, its inhabitants, resources, and institutions. He was a keen and accurate observer, and had a very retentive memory. He loved nature in all her forms and aspects. His love of trees, shrubs and plants, especially flowers, was almost a passion. While he lived in Winona, in addition to such as he could find at home, he was accustomed to get from other states, and to import, rare plants, bulbs, and seeds, the cultivation and growth of which he greatly enjoyed.

"He was pure and simple hearted as a girl. While he lived comfortably and surrounded himself and his family with whatever might in any way add to their comfort, enjoyment, or improvement, he always lived modestly. He intensely disliked ostentation or unseemly display of wealth, learning, or superiority of any kind, and hated all forms of guile or duplicity. He did nothing to be seen of men. Considering that he was not a wealthy man, he was a liberal giver, especially to those who were in need; but in his giving he let not his left hand know what his right hand did.

"He sincerely sympathized with and prized the classes who earn their bread by the sweat of their brow. Nothing aroused his ire more than an attempt to oppress or wrong them, or excited his contempt more than a word or act intended to belittle them. By his life he showed his belief in that sacred fundamental truth, that the greatest good of the greatest number is the proper foundation of morals, legislation, and political action. While he recognized the fact that the best interests of society and of every class require, and that it is the duty of the state to see to it, that there be rendered to Cæsar the things that are Cæsar's—that the person and property of every citizen, irrespective of his wealth or rank, be sacredly protected at all hazards—he never forgot that the protection of the poor, the weak, and the defenseless is the first duty of the state.

"As a father he was fond, tender, and kind; but showed his feelings by acts rather than by words. He was a true friend, and a most interesting and attractive companion. He had a fine vein of humor, an almost inexhaustible fund of anecdote and information, and an abnegation of self that was at times embarrassing to his associates, for it required constant watchfulness—sometimes emphatic protest—to prevent him from giving them the preference in everything and the best of everything.

"He was not a member of any church, but he attended and contributed to the church of his fathers, and he had no toleration for any one who spoke disrespectfully of religion.

"I here venture to refer to what may be considered a weakness, for his reputation does not require that aught should be hidden; it needs no eulogy but the truth. He was not an optimist or a very hopeful man; he did not dream of, or hope for, any great social or political reformations. He was not a bold or masterful man. In great crises he would not have been a leader. He did not willingly meet—on the contrary, if he reasonably could, he avoided—a conflict. When wronged, even by falsehood or treachery, he was prone to forgive and forget, or, when that was not possible, to hold his peace rather than expose or denounce the malefactor. For some such (as it seemed to me) weaknesses, I sometimes chided him, for between us there was no enforced ceremony. In our inter-

course we were accustomed to speak with a freedom that would have been inadmissible had either entertained the least doubt of the unfailing friendship of the other. In these respects it is probable that I, not he, was wrong. If these were not, I never discerned in his character a fault or weakness. A more upright man, a better citizen and neighbor, a more kind master or a more genuine and lovable friend, I never knew. There was no base alloy in his nature. His hands were clean, his heart was pure; he had not lifted up his soul to vanity nor sworn deceitfully. It need hardly be said that his neighbors and acquaintances loved and honored him. He had no foes but such as good men must expect.

"He never liked the ordinary practice of the law. He was not an orator, or a master of those arts which make men notably successful advocates or trial lawyers. He was very strong at the bar, but the foundation of his strength was his superiority as a lawyer and his confessedly high character. I hardly know whether he merited more praise as a judge on the circuit or on this bench. I think—and I believe those whom I see before me who used to practice before him on the circuit will agree—that he was almost perfect as a *nisi prius* judge.

"The judicial bench is holy ground. 'Honesty,' as applied to a judge, means more than when used in the ordinary transactions of men. To be an honest and good judge, a man must be devoid of pride of opinion, regardless of either popular commendation or condemnation—uninfluenced by the desire to be consistent—must, for the time, forget all enmities and friendships, and also himself, which is above the reach of the ordinary man. David Dudley Field, in one of his addresses, did not exaggerate when he said: 'To have the power of forgetting, for the time, self, friends, interests, relationship, and to think of doing right toward another, a stranger, an enemy perhaps, is to have that which man can share only with the angels and with Him who is above men and angels.' Measured by even this high standard, Judge Mitchell was not found wanting. As a judge he seemed to be absolutely without pride of opinion—to be oblivious of everything but the demands of justice. He was not only willing, but anxious, to discern and correct any mistake—if mistake there was—in any judgment or opinion that he had ren-

dered. It was a pleasure to listen to his trial of a case without a jury, or his charge to a jury. He listened patiently, and he so clearly and with such manifest fairness stated the real issues—eliminating all that were irrelevant—that no jury of ordinary intelligence could misapprehend the questions which they were to try; nor could any attorney or party feel that he had not been justly treated.

“It is hardly necessary in this presence to speak of him as a member of this court. Every citizen, and especially every lawyer and judge who is jealous for the reputation and honor of the state and its courts, must be proud of the fact that his opinions have been so often quoted and commended by the ablest jurists throughout the country as models of learning and ability. That he was appreciated at home, is shown by the fact that for more than a quarter of a century he was kept continuously on the judicial bench—having been twice elected in a judicial district, and three times in the state, and once appointed by a Republican governor, both the district and state having a large majority against him politically; and by the fact that, at the Republican nominating convention preceding the last general election, over three hundred of the delegates voted for his nomination, notwithstanding the most strenuous efforts of the politicians who, considering the judgeship a mere political asset, insisted that no one not belonging to the party should be considered.

“His standing abroad is shown by the following excerpt from a letter of Professor Thayer—eminent not only as a professor in the Harvard Law School, but also as an attorney and legal author—written to a friend of his in this state two years ago, when it became known that an effort would be made to defeat Judge Mitchell’s nomination and election. Prof. Thayer wrote:

“‘I am astonished to hear that there is doubt of the re-election of Judge Mitchell to your supreme court. I wish the people of Minnesota knew the estimate that is put upon him in other parts of the country, and there could be no doubt about it then. I never saw him, and have no personal acquaintance with him. I know him only as a judge whose opinions, like those of all the judges in the country, reach me through the excellent law reports published in your state. In the course of my work at the Harvard Law School

I have long had to search carefully through these reports for cases relating to my special subjects. In that way I have long recognized Judge Mitchell as one of the best judges in this country, and have come to know also the opinion held of him by lawyers competent to pass an opinion on such a question. There is no occasion for making an exception of the supreme court of the United States. On no court in the country to-day is there a judge who would not find his peer in Judge Mitchell. \* \* \* Pray do not allow your state to lose the services of such a man. To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law. Your state it is that is now on trial before the country. The question is: Can Minnesota appreciate such a man? Is it worthy to have him? I am not going to believe that a state which can command the services of one of the few judges in the country that stand out among their fellows as pre-eminent, that give it distinction, will refuse to accept these services. You lawyers of Minnesota must not let party politics work any such result.'

"In a recent edition of one of our ablest law books, the authors, referring to a question on which the highest courts of the country were irreconcilable, say:

"The best statement of this rule, and the reasons for it, is in *Morse v. Minneapolis, etc. R. Co.*, 30 Minn. 465. The rule has been repeatedly enforced in New York, although never with a statement of reasons approaching to the clearness of Judge Mitchell's opinion in the Minnesota case.'<sup>1</sup>

"I might multiply such references, but it is unnecessary. His opinions are his best monument.

"He was in every sense a model citizen of a republic. At a time when wealth, acquired suddenly and sometimes by questionable means, is flaunted in the face of honest men by its vulgar possessors—when that which is so often heralded as liberality or charity is merely a sounding brass or tinkling cymbal, an effort to advertise or glorify the donor when honest worth is so often superseded by self-asserting ignorance, what an object lesson and inspiration such a life is to those who unselfishly aim to serve their state and benefit their race! What a contrast it is with the life of those whose sordid aims all end with self! What a reproof to the demagogue who seeks promotion by disingenuous appeals to ignorance, passion, and prejudice! Who can measure or foretell its influence on

<sup>1</sup> Shearman and Redfield, *Negligence* (5th Ed.) § 60c. note 3 [Reporter].

those who follow after, for example acquires authority when it speaks from the grave.

"Our friend was not quite sixty-eight years old. Though some live and work longer, it is still as a rule true that the days of our years are three score years and ten. Most men, perhaps all, before they reach that limit, have some premonition that the afternoon of life is nearly gone. Lowell, on his sixty-eighth birthday, thus beautifully expresses this truth:

" 'As life runs on, the road grows strange  
With faces new, and near the end  
The mile-stones into head-stones change.  
'Neath every one a friend.'

"Not a few of Judge Mitchell's early friends had taken their departure within the last two or three years. He not infrequently spoke of this to me. He was not unmindful of the fact that as to him the sun would soon set. His life work—the work for which he was so peculiarly fitted—was done. For the last few months his physical strength was waning; the hills were beginning to get rugged and steep; the light to wane, and the shadows to deepen and lengthen. The last walk I took with him he spoke of his failing strength. Though he was surrounded and cared for by a lovely, loving, and loved family, he saw that they were following him with anxious, almost tearful eyes, and he was not the man to delude himself with the hope that their anxiety or fears would grow less, or his strength greater. Under such circumstances, what could an old man do but die? And death came as he hoped it might at the last come to him—suddenly.

"While his going away took out of my life much of the little sunshine that is left, I would not be so weak and selfish as to call him back if I could. Having been absent from the state, I did not see him for nearly two months before his death, and the first news of his illness was a telephone message that he was dying, followed in a few minutes by another, that he was dead.

" 'Some tears fell down my cheeks, and then I smiled  
As those smile who have no face in the world  
To smile back on them. I had lost a friend.'



"I condole with his family and friends; but at the same time congratulate them. I know that the loss of his presence and companionship cannot be expressed by any words; but when the keenness of the pang is past, with what pride and pleasure will they remember the beauty and simple grandeur of his life. What a heritage for his children?"

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Hon. Daniel A. Dickinson then addressed the court as follows:

"May it please your Honors:

"Before this court of supreme jurisdiction, of which for nearly nineteen years William Mitchell was a member, appears to-day, with one mind and heart, an unusual assemblage of the bar of the state, to offer a tribute of esteem and love, and to express our appreciation of his eminent virtues and his great service to the commonwealth. This is fittingly done in the formal memorial which has been presented to your Honors, that it may be inscribed in the enduring records of this court. The language of that memorial, and that which is spoken here to-day, is not a merely customary, conventional expression of just appreciation of the character and services of a jurist distinguished in his time for eminent ability, learning, mental vigor, and the highest qualifications for the office which he filled so long. While he was thus justly esteemed throughout our own state, and wherever, beyond our borders, the common law prevails and the decisions of this court are consulted, the large circle of those who had intimately known William Mitchell in social life, in the law-making branch of our government, at the bar, on the bench of our court of general jurisdiction, and of this highest tribunal of the state, and especially those who were closely associated with him in the labors and familiar intercourse of daily life, acquired for him a personal attachment which has rendered his death an individual bereavement. And so we are here to express, not merely eulogium of the dead, but a widely-felt personal sorrow for his death.

"Few men, and probably none, have rendered greater or more enduring and beneficent service to the state. Few, either here or elsewhere, have been in all respects better qualified, by natural en-

downments, mental and moral, and by education, experience, and habit of life, for the discharge of the duties of the high office to which he was called in the prime of his manhood, and to which he devoted, with constant, strenuous, forceful study, thought, and action, about one-half of the period of his life labors. Passing over his distinguished service in the years which preceded his coming into this court, that which he rendered here for almost nineteen years is beyond our power fully to measure or estimate. He never sought display; and the results of his work are not a mere monument, a structure of no practical or beneficent use, save as a memorial of what he achieved. The results of the years of his patient, tireless, earnest, honest work here are wrought into, and constitute an important part of, the grand structure of the law of this state and country, a temple of justice, wherein dwelleth righteousness. And while we cannot measure and define the extent of what he thus contributed to the benefit of his own time and of future ages, we know that few here, or elsewhere, have wrought better or contributed more to make that structure what it is to-day. He, far more than most jurists, by daily patient research among the often confused and even contradictory declarations of the expounders of the law, brought forth, as pearls from ocean's obscure depths, the clear legal principles which should control human action. No well-sounding legal proposition, though familiar and current as true coin, was accepted by him without test, whether expressed in the decisions of this or other courts, or in argument at this bar, if wanting in the true ring of reason and right. We can all recall how often he challenged some widely current declaration of the law, and after painstaking examination demonstrated its fallacy. And such demonstrations, expressed in the decisions of this court, have been time and again accepted in other courts as true statements of the law. No labor was too great if he could thereby discover the truth and do justice.

"It is fitting on this occasion that I, who was associated with Judge Mitchell for more than twelve years in this court, should testify, as I now do, not only in behalf of myself, but of three of his associates no longer living, Gilfillan, Berry, Vanderburg—for I know they would desire such acknowledgment to be made if they

could speak here to-day—the great assistance which we all derived from his wise counsel in the deliberations of this court.

“The executive appointment of Judge Mitchell to this court, his repeated re-election by the people without party division, and the unanimous sentiment of the bar, attest the general sense of his fitness for the highest judicial office. Though he could not but be conscious of the esteem in which he was held, he was absolutely without affectation, ignoble pride, egotism, or apparent sense of the general estimate of his worth. He was quick to acknowledge, and if possible to correct, his own mistakes—for all judges and all courts do make mistakes. (If it were not so we should not find in the reports of every jurisdiction tables of overruled cases.) His sense of justice and right was a strong, even so dominant a quality of his mind that he sought every way of escape from such application of fixed legal principles as might result in hardship or wrong in the individual case. He was affable, courteous, genial, sincere, and manly always, everywhere and toward all. In characters as strong and positive as Judge Mitchell’s there is often manifest some quality of mind or heart falling below the standard of real excellence—some defect which, on an occasion like this, we would cover with a mantle of charity. But neither your Honors, nor we of the bar who have known Judge Mitchell most intimately during all the years past, can recall anything detracting from the general symmetry and beauty of his life and character, anything wanting in purity, strength, breadth, nobility of purpose and action, or in any of the qualities which justly earned for him the highest esteem of all who knew him, and a high place, for all time, among the eminent jurists of this country.”

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Hon. Thomas Canty then spoke as follows:

“Your Honors:

“Judge Mitchell was a bright jurist of quick perception, great capacity for work, and a wonderful facility and felicity of expression. His opinions will always stand as amongst the best written in the English language.

"He was a simple, modest, learned gentleman, with a heart full of the milk of human kindness. He was a great lover of justice, but he also loved to temper justice with mercy. Neither long years on the bench, nor the rush of business, nor the vast labors thrown upon him ever stifled in the least his sympathy for the wronged; and whenever a case arose in which through the ignorance of the party, the blundering of his attorney, or the misconception of the court below, injustice was done to the poor and unfortunate, and there seemed to be no way by which the supreme court under the law and its rules of practice could remedy the wrong, Judge Mitchell always worked and worried and strove to find a way. While he was constantly engaged in the work of bringing criminals to justice, he was too kind-hearted to prosecute those who wronged him and violated his confidence.

"Judge Mitchell was a man singularly free from prejudice, bias, and bigotry, and it always pained him to discover that any judge in his judicial duties was influenced by anything of the kind. He had no pride of opinion. If he came to the conclusion that a decision in which he had participated was wrong, he was always ready to overrule it or grant a re-argument.

"He was a scholarly man of wide reading and possessed a large fund of general information. He was well versed in the ways of society, and was always welcomed by its votaries, but he cared nothing for the ordinary whirl of society; there was too much sham and subterfuge in it to suit him. He always liked to meet his friends and was a genial and companionable man.

"Judge Mitchell has done much to give this court a standing with the bench and bar of this country and England; and his opinions, running through more than 50 volumes of the Minnesota Reports, will stand as a monument to his memory long after all the granite monuments now in the world have crumbled to dust and drifted away."

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Hon. Charles E. Flandrau then addressed the court as follows:

"If your Honors please:

"It being my desire that the testimony of the oldest practitioner

of the law in the state, and a member of the first supreme court of the state, to the excellencies of the late Judge Mitchell should go on record in these memorial proceedings, I have prepared a brief, but none the less heartfelt, tribute, which with the permission of your Honors I will present.

"It is with reluctance that I attempt to say anything on this occasion, because of my inability to rise to the deserved heights of eulogy demanded by the subject under consideration, and because the speakers who have preceded me have exhausted the language of panegyric in presenting the virtues of our deceased friend. I cannot add to his universally-acknowledged reputation as a man, a lawyer, and a judge. In each and every relation that he bore to his fellowmen in life, he was as near perfect as it falls to the lot of man to be. I feel that to have been chosen from the members of the bar of the state, as one to portray his characteristics for perpetuation in the record of this court, is more honor to me than anything I can add to his fame, much as I loved and esteemed him.

"Judge Mitchell passed a large portion of his life on the bench, actively engaged in administering the law among his fellowmen, in adjusting their many and complicated differences and misunderstandings. I have known him intimately from his first elevation to the bench to his retirement only a short time ago, and I cannot recall a single instance in which his judgments have not been approved by those best fitted to decide as model expositions of the law, clothed in scholarly, lucid, and eloquent diction.

"To be a good and just judge, a man must be endowed with many, if not with all, the virtues of mind and disposition. He must have good practical sense, experience, and understanding; a clear and quick perception of facts, with the power of logical arrangement and application of them to the matter in hand, aided and guided by a thorough knowledge of the law in point. He must be absolutely impartial and free from prejudice. He must be patient to listen and to learn. He must be courageous and firm without obstinacy, but tempered with mercy. His life conduct must be so exemplary as to preclude the possibility of wrong doing or wrong thinking. Judge Mitchell possessed all these attributes in an eminent degree.

In his death Minnesota mourns the loss of one of her most beloved and distinguished citizens."

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Hon. William J. Hahn then addressed the court as follows:

"We can do ourselves no greater honor as men than to pause and approvingly contemplate the pure, conscientious, patriotic, high-minded character of a departed friend. We can, as lawyers, offer no better evidence of our appreciation of the highest and best aspirations of our profession than by giving public voice to our sense of loss when death invades the ranks of our profession, and removes one of its honorable and justly honored members. We can, as a part of one of the great subdivisions of our governmental machinery, perform few more commendable and helpful duties than registering in the archives of the court a brief memorial of the worth and public services of some great, fearless, spotless judge who has gone to his reward. We are here at this time to thus honor ourselves; to proffer testimony; to discharge that obligation.

"In this rushing, grasping, sordid age of materialism in which we live, it is refreshing and inspiring to contemplate the life and character of one whose gaze was fixed on higher things than the mere acquirement of wealth and honor; whose ears were open to more harmonious sounds and nobler strains than the din and turmoil of selfish achievements; whose voice was heard in gentler tones and sweeter accents than the fierce cry of personal victory; whose heart throbbed with warmer impulses and more embracing motives than earthly gain or kindred ties; whose soul yearned for higher achievement and more enduring fame than mere success or passing applause; whose life was actuated by manlier ambition and truer purpose than social distinction or personal renown.

"It is such a life and character we are here to reflect upon. Gentle, kind, modest, considerate, sympathetic, helpful, and yet strong, firm for the right, persistent in duty, unyielding in principle; in every fiber of his being, in every emotion of his heart, in every impulse of his soul, a shining example of God's exalted handiwork, a noble man.

"As a lawyer few men have added as great luster to the bar of this state either by marked ability, fearless performance of professional duty, keen and quick perception of controlling principles, highminded and courteous demeanor, honorable and fair conduct toward court, jury, and opposing counsel, as did Judge Mitchell. Cogent, vigorous, terse, clear, effective, obliging, polite, honest, he was my beau ideal of a lawyer. No court ever listened to him without being enlightened. No jury was ever addressed by him without being thereby helped in the performance of its duty. No opposing counsel ever met him in the heat and stress of a legal contest, without carrying away with him a truer view of the proper and possible amenity which should characterize the conduct of the profession.

"He was not content to devote his faculties to the mere accretion of wealth or to the selfish pursuit of his own interests and the interests of his individual clientage, important and sacred as they were. He also felt it to be his duty as a lawyer to exercise a salutary sway in the fashioning and moulding of our jurisprudence and laws, and to exert a healthy and conservative influence on the community in which he lived, through the clients whom he advised, the juries whom he addressed, and the citizens with whom he mingled. He took a broad view of what, as a member of the legal profession, was due from him to the state. He acted upon the theory that, as a citizen, his obligations were commensurate with his opportunities, and these, by reason of his training, learning, and ability, were greater than those of any other class of citizens. To the discharge of these obligations, the embracing of these opportunities, he devoted his faculties with the same conscientious estimate of his calling as in the performance of his more immediate professional service. It was because of this and of his sweet, blameless character that his death was regarded by the citizens of Winona, where he lived so long, as a personal loss.

"Only the actions of the just,  
Smell sweet and blossom in their dust."

"But it is as a judge that William Mitchell will be longest and most universally remembered and revered. It was in that exalted and sacred place, in the full gaze of his brethren at the bar

and the community at large, that all the elements of his high character, all the solidity and brilliancy of his natural gifts and individual acquirements, all the clearness and keenness of his logical mind, found full opportunity for their display and exercise.

“With a vast business experience; an extensive and varied practice at the bar; a profound knowledge of the science of the law, and a mind peculiarly fitted to apply such knowledge to the varied and ever changing circumstances and conditions of a highly progressive people, coupled with a kindly considerate disposition, and naturally fair and honest operation of mental processes which he possessed in a remarkable degree, he was especially fitted for the discharge of the weighty responsibilities devolving upon a man occupying a position on the bench.

“I knew him intimately. I was honored by his friendship. For twenty-six years it was my privilege, from time to time, to stand before him as an advocate either in the district or supreme court. No man, in my judgment, has occupied a judicial position in this state, in state or federal court, who possessed the qualities of an ideal jurist in any greater degree than Judge Mitchell. I never knew a man so utterly devoid of pride of opinion as he. I never appeared before a judge more eminently fair, more clear headed, with a more discerning and discriminating judgment, with a vaster fund of common sense, with a surer intuition of what the law ought to be, more genial and affable, than he. In my opinion there is no mental quality, moral requirement, or dispositional tendency which can be named, or required in the ideal judge, which was not found in his make-up. I think it may be truly said that he was regarded by the bar as being one of the ablest and clearest-headed judges who ever sat upon this bench, and with equal truth that but few men in this state are or were so generally esteemed by laymen or lawyers, and but few who had or have the unbounded confidence and esteem of our citizens as he.

“How often have each one of us, in arguing some case in this court, had a query propounded by him in that kindly way of his, that showed beyond preadventure that he had clearly grasped the real and controlling point in the case. A question not to embarrass, but to help; asked not to display his own discernment, but



to aid in the solution; submitted not as indicating his own unalterable view, but with the evident desire to overcome and remove, if possible, what at the time occurred to him as an objection. And in endeavoring to answer such question, I think I am warranted in saying that counsel invariably felt that what he had to say was addressed to a mind as free from bias, or preconceived notions, and as open to conviction and conversion as if the same had proceeded from some other source. And when he put upon paper the ultimate conclusion of this court in cases assigned to him, there never was any doubt in the mind of any lawyer as to what the court had determined, or any lingering suspicion that any material fact in the case had been suppressed or warped, or any position of counsel misunderstood or evaded to meet the exigencies of the decision. Clear, luminous, forceful, judicial was the tone, matter, and manner of his opinions. In them and by them he has erected for himself a monument 'more enduring than brass and more lasting than the Egyptian Pyramids.'

"Quietly, peaceably, and largely unrecognized, he conscientiously and well performed his public duties. Loved as a man, admired as a lawyer, revered as a judge, he has in the very height of his well-won praise been gathered to his fathers.

"'God's finger touched him and he slept.'

"For us who remain his life will be a benediction; his character an exaltation; his example an inspiration.

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Hon. M. B. Webber then addressed the court as follows:

"May it please the Court:

"I certainly cannot hope to add anything to the eloquent words already uttered, in commemoration of the life of William Mitchell; and except for the sense of duty that impels me, I should have preferred to remain a respectful and silent listener in this hour of eulogy. The accidents and vicissitudes of life, which play so controlling a part in the career of each of us, led me to an acquaintance with Judge Mitchell while I was yet preparing for the bar, and his

condescending kindness and consideration of me challenged my admiration, and won my esteem, and I shall ever revere his memory. Under him I was admitted to the bar, and began my practice at Winona, while he was yet judge of the Third judicial district, and although the interim was brief before his elevation to this bench, it was ample for me to learn his worth as a citizen, a man, a friend, and a judge. Like the rocks, the trees, and the fields where we roamed as children, our first efforts, victories, and defeats in our profession, are indelibly stamped upon our memories, and I shall ever remember the patient forbearance and kindly offices of Judge Mitchell, his counsel and encouragement in my first feeble efforts at the bar, and his words of consolation in defeat, when defeat was hard to bear.

“There is a passage in one of Lucian’s Dialogues where Jupiter complains to Cupid that he had never been beloved; and Cupid advises him to lay aside his ægis and his thunderbolts and to place a garland on his head, and to walk with a soft step and assume an obsequious deportment. Jupiter replies that he is unable to resign his dignity; then Cupid tells him he must leave off desiring to be loved. It was one of Justice Mitchell’s traits of character that endeared him to all, that he was always approachable, and while he never doffed dignity to don vulgar familiarity, he was the same to all men, at all times. Liberal in his views, unobtrusive in his convictions, plain, unostentatious, he came near to the common people, who never questioned when he had spoken. His best eulogy is indeed the speech of his neighbors. From the humble abode of the laborer, as well as from the more pretentious mansion of the banker or merchant prince, come alike expressions of admiration for his life, and sincere regret at his sudden demise.

“I would avoid the tendency on occasions like this to fulsome praise, for nothing would be more distasteful to the deceased could he hear, yet,—‘Praising what is lost makes the remembrance dear.’

“Justice Mitchell was fortunate in his reputation. A man’s character is builded by himself; it cannot be created nor destroyed by another. ‘But reputations are the sport of circumstances, or the prey of malice, often beyond the control of the possessor and as often fictitious and unjust.’ But the deceased, in a marked degree,

enjoyed a reputation that was unsullied as his character. Hence his sudden death, stricken down with his faculties still unimpaired, came as a sudden shock and irreparable loss to the community where he so long lived. After all, perhaps to him, thus taken in the very zenith of his fame, it were better than a lingering death: 'For whether in mid-sea, or among the breakers of the farther shore, a wreck at last must mark the end of each and all.' No words of ours here to-day can build for Justice Mitchell a monument one half as lasting as he has constructed for himself in the records of this tribunal, which will be read and quoted when eulogy shall have been forgotten.

"Occasions like this are accustomed to impress me with much emptiness; the words of eulogy here uttered to-day come late to him of whom they are spoken, and can console but little those who mourn his sudden demise; and perhaps all of value that in them lies is whatever of inspiration to better things is found in his modest, plain, simple, rugged, and stainless life. Memorial exercises would be not only an idle ceremony but a mockery, if they were merely to afford an opportunity for public expression of sorrow for the dead, and extolment of their virtues. Commemorating thus publicly the distinguishing qualities, whether of character or intellect, or both combined, furnishes an incentive to emulation by the living, making better citizens, better men and women. They at least tend to contribute to the fashioning of a higher order of society and stimulating in youth ambitions to loftier purposes and the achievement of higher ideals.

"The life of Justice Mitchell may well furnish an example, and he will long live in memory.

"The dead are like the stars by day,  
Withdrawn from mortal eye,  
But not extinct, they hold their way  
In glory through the sky.'"

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Hon. William H. Yale then addressed the court as follows:

"William Mitchell and myself came to Minnesota in the early spring of 1857, and we lived as neighbors and friends for more than

forty years. For several years, and until he was called to the bench, we were partners in the practice of the law, both of us having been admitted to practice in the year 1857, while Minnesota was a territory. I think, therefore, that it is not egotism on my part if I claim that, by reason of my greater opportunities during the forty-three years since April, 1857, I came more thoroughly to know and understand Judge Mitchell, in all of his various relations to the bar and to the people, than perhaps any member of this court.

"While all members of the bar practicing before this, the highest judicial tribunal in the state, had the greatest respect for Judge Mitchell, as an able, impartial, and conscientious jurist, the members of the bar of the Third judicial district, where he lived and practiced as an attorney for the first seventeen years of his residence in Minnesota, are more competent to speak of his character and many excellencies as a practicing attorney and counsellor.

"Judge Mitchell never attempted to be an orator, but every district judge before whom he appeared had the utmost confidence in his sterling integrity, his keen powers of analysis, and the eminent fairness with which he treated all questions of fact or law. His courteous and generous treatment of opposing counsel and his pleasing manner of questioning witnesses, not only those on his own side but the witnesses opposed, as well, won for him the confidence and good will of all the people in his district. In his arguments and addresses to juries he never attempted by any specious sophistry to mislead or deceive, never attempted any flowery flights of eloquence, but simply stated the facts as given by the witnesses on the trial, with fair and temperate comment as to his ideas of the merits of the case, in such a forcible and unpretentious manner that it was very difficult for counsel opposed to eradicate the strong impressions he had made on the minds of those jurymen.

"While district judge, his courteous and kindly treatment of the members of the bar who appeared before him, especially the younger members, made them his friends, and helped to smooth over the rough places in their practice of law.

"In the city of Winona, where Judge Mitchell had spent more than forty years of his life, the people of all classes not only respected him for his many sterling qualities, but they had learned

to love him. He had enshrined himself in their hearts. And I do not think I state it too strongly when I say that they not only respect, but cherish his memory, more than that of any other man who ever lived in that county.

"As a citizen Judge Mitchell never pandered to the prejudices and weaknesses of the people, but ever stood firm for the right. In all matters pertaining to the welfare and upbuilding of the city where he made his home, he gave of his time and energies toward the accomplishing of what he believed would be for the best interests of his fellow townsmen and neighbors, freely and lavishly, but not ostentatiously.

In the legislature of 1859 and 1860, he was one of the representatives from the county of Winona. In that legislative body he was known by his colleagues, and especially by those who were on the house judiciary committee, to be not only a hard and untiring, but a judicious worker. The state was then in its infancy; the inhabitants a heterogeneous people, scattered over a large extent of territory. They had come from the eastern, middle and northern states with a fair sprinkling from nearly every nation in Europe. The future prosperity of the state was largely dependent upon the kind of laws with which we started. To assimilate the views of the New Englander with the views of the southern and western members was no easy task, but it was accomplished. And the bulk of our city, town, and county regulations framed at that session of the legislature is the law under which we now live. The few members of that legislative body who are still living will freely testify that William Mitchell, then a young man, was one of the most tireless, indefatigable, and successful workers of that lawmaking body.

"Fifty years ago but a mere handful of white people had ever lived within our borders. To-day a population of nearly two millions causes Minnesota to stand in the front rank of that glorious galaxy of states which make up this great American republic. I think sometimes that we forget the lasting obligations we are under to those early settlers of Minnesota who fashioned our laws, and marked out the policy of our state, on such broad and lasting foundations. To few if any among the pioneers of Minnesota is

greater credit due than to our deceased brother, Judge William Mitchell.

"As lawyer, as jurist, as citizen, in all and in every capacity he was called upon to act, he performed life's duties fearlessly, conscientiously, and wisely; and during all his mature years led a blameless life, and maintained a pure and incorruptible character.

"This court and the members of this bar all feel that we have sustained an almost irreparable loss; but we have this consolation that we can join with the people of the whole state in pointing with pride to the stainless and unsullied reputation which Judge Mitchell has left behind him as a legacy to the people of the state of Minnesota."

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At the conclusion of these addresses the following responses were made upon behalf of the court:

ASSOCIATE JUSTICE COLLINS then said:

"Gentlemen of the Bar:

"The appointment of Judge Mitchell to the position of associate justice, in 1881, brought to a tribunal which had from the beginning been extremely fortunate in its membership, a man who, probably above all others whose names had been mentioned, was regarded as the best equipped for the place, and his work here for more than eighteen years fully justifies me in asserting that this estimate of his ability and fitness was amply and fully warranted.

"The first opinion written by him as associate justice was in the case of *Fenno v. Chapin*, filed April 28, 1881, and published in 27 Minnesota at page 519, and his last opinion was written in *State ex rel. Zaske v. Matter*, and was filed December 15, 1899, reported in 78 Minnesota at page 377.

"He enjoyed, while district judge, the distinction of being called by the governor to sit in 1877 as a member of this court, and of writing an opinion at that time in an important case, *State v. Young*, 23 Minnesota 551. But one other judge of the district court, the Honorable Samuel Lord long since deceased, has been so honored. In the almost nineteen years of service, Judge Mitchell

wrote, as has been stated, over 1,500 opinions—more than any of his predecessors or colleagues have written and many more than have been prepared by any of the justices of the supreme court of the United States, although several have served a greater number of years than did Judge Mitchell.

“It was his fortune to be a member of this court when the business before it had grown to be extremely burdensome. He saw the calendar increase from 108 cases at the April term in 1881 to 358 at the October term in 1895, an increase in fourteen years of 250 cases a term. During the period of time referred to I find that the paper books and briefs, as bound and filed in the State Library, constitute 809 volumes, averaging 800 pages to a volume. The amount of labor performed by Judge Mitchell in the examination of these files is not easily comprehended, even from these figures, but no member of this court ever gave more thorough study to the printed record in each case than did he.

“Socially Judge Mitchell was extremely attractive. His early education was liberal, and in his mature years he broadened it by a persistent reading habit, continuing to the day he was stricken down. There were few subjects worthy of consideration in which he had not taken interest, and, upon all the topics which from time to time were brought to the surface of the swiftly-moving current of daily events, he promptly and thoroughly advised himself and became familiar. While not averse to society, he never mingled in it freely or with entire satisfaction to himself. He much preferred his books, the presence of a few intimate friends, and above all association with the members of his own family. He was a great lover of nature and never happier than when he was taking a few days recreation in the woods, within easy reach of an inviting body of water. I never knew Judge Mitchell as a practicing attorney, and for that reason cannot speak of him in that capacity from personal knowledge. Others have done that, and their words of praise come from the lips of those who met him at the bar and in the sharp contests that we find there, contests in which the true nature and character of all men of our profession are brought out and developed, and their worth and merit exhibited to their fellow men, who as a rule measure and determine honestly and fairly.

With his clear legal mind, his ability to seize upon the pivotal points, his capacity for professional work, his conciseness of statement, which in itself was always a powerful argument upon the merits of a case, and above all his fairness in any controversy, he must have been an adversary to be feared as well as honored, in any legal battle.

"I was associated with him in the work of this court from November, 1887, to the end of 1899, a little more than twelve years. I do no injustice when I say that not one of his predecessors or colleagues surpassed him in learning or ability, and not one has been or will be held in greater esteem by the people of this state, or by the professional men who have been brought in close relation and almost daily contact with the members of this court. His patience and courtesy as an official were proverbial, and it was rarely that his equanimity became at all disturbed. He despised unfair practices, and pretenders and frauds sometimes found this out in a way well calculated to be remembered and perhaps to remedy and reform. His acute legal perceptive qualities, and his clean cut logical reasoning, are to be found all through the opinions prepared by his hand, and now adorning the pages of the 52 volumes of reports in which they are perpetuated, time-enduring evidences of the professional skill and ability of a man who, in my opinion, as a justice of this court has had no superior among the many distinguished men who have occupied like positions in the courts of the northwestern states.

"Of the close relations which existed between our friend and his colleagues I need say but little. They were always of the most satisfactory character. No one could be intimately associated with Judge Mitchell and not be impressed with his commanding ability, his simple unaffected ways and his perfect character. No one could serve with him on the bench without appreciating his genial qualities, his general information, his capacity for work, his natural vigor of mind, and the ease and promptitude with which his mental faculties were exercised. His conclusions upon the legal propositions involved in a case were never hastily reached, nor from mere cursory, incomplete examination. They were almost invariably correct and, in consultation, maintained with vigor and effective-



ness, but never with any air of consciousness of his own superb mental attainments, or with pride of opinion. Unaffected, genial, anxious to be of assistance and always surpassingly helpful, a more companionable associate in the labor of this court could not be imagined.

"The messenger of death came very suddenly, but it found him ready, for his whole life had been one of preparation for that which lies beyond. His friends should be thankful that to one whose deportment as he went in and out among men had been so tranquil, and whose life work had been so patiently and perfectly performed, there came not days of lingering painful disease, but a peaceful passing to the eternal sleep.

"And now to the memory of a man whose days were filled with honor and usefulness, and whose life abounded with right thought and good deeds, we must say the last words of reverence and affection. Not many men of our personal acquaintance have performed their parts in life more modestly or worthily, and not many have gone hence of whom their fellow travelers upon earth could wish to speak in more eulogistic words, and few have gone from among us to whom we could have been more reluctant to say the final farewell."

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CHIEF JUSTICE START then said:

"Gentlemen of the Bar:

"Your memorial is a just and merited tribute to the learning and worth of Justice Mitchell, and aptly expresses our own estimate of his character and public services. He was a great lawyer and a great judge, but he was more, he was a great man. His life was an open book with no sealed or impure pages. He was a modest man. His sail was never bigger than his boat. His manner was direct, simple and unaffected. He was a man of the best abilities and of the weightiest character. His mental grasp was clear and incisive, his impulses honorable, his aims lofty, and his love of justice and truth supreme. To those who did not know him intimately he may have seemed untender, but in fact he was a man full of 'the gentlest humanities,' as loving and as tender as a

woman. He however seldom expressed his regard for others in words, but he did so by his gentle, unobtrusive, and kindly services to them. Like Cordelia he could not heave his heart into his mouth, for his love was richer than his tongue. He never prated of duty and conscience, but he was absolutely loyal to both, and fearlessly did that which he believed to be right regardless of consequences to himself. He achieved success without elation, and accepted defeat with equanimity. His simplicity of character, his practical and sturdy common sense, his profound knowledge, his genial humor, and his tactful kindness made him a delightful companion and a most valued friend.

"I first met Judge Mitchell thirty-five years ago, and for a quarter of a century we were intimate friends. The longer I knew him the greater was my respect and friendship for him. I shall ever cherish his memory with reverent affection.

"The period of his judicial career was twenty-six years, approximately, seven years as district judge and nineteen years as a justice of this court. He discharged the duties of judge of the Third judicial district with promptness, great ability, rare discretion, absolute fairness, and to the entire satisfaction of the people and bar of his district. His high character, great abilities as a jurist, and the magnitude and value of his services to the state have been extolled by you with generous appreciation, but without exaggeration. My associates and myself sincerely and gratefully concur in all that has been here said in commendation of him and his judicial work, which has enriched American jurisprudence.

"It is proper that your memorial should be recorded in the records of the court, there to remain a perpetual testimonial to the virtue and work of a public-spirited citizen, a just and fearless judge, and a good man, William Mitchell. It is so ordered, and that the court now adjourn as a further tribute of respect to his memory."

IN MEMORIAM

## PROCEEDINGS

IN MEMORY OF

CHARLES H. BERRY,

FIRST ATTORNEY GENERAL OF THE STATE OF MINNESOTA.

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On the afternoon of Wednesday, January 2, 1901, in the supreme court room at the state capitol, Honorable A. H. Snow, in behalf of the members of the bar of Winona county, presented to the supreme court, then in session, the following memorial and sketch of the life of the late Charles H. Berry, who was the first attorney general of the State of Minnesota, hence, at that early day in a special sense, one of the court's officers.

Charles H. Berry—General Berry, as his acquaintances were wont more familiarly to call him—first saw the light at Westerly, in the little state of Rhode Island, on September 12, 1823. He was one of ten children. His father, Samuel F. Berry, alternated in occupation between seafaring and farming, and his mother, whose maiden name was Lucy Stanton, possessed more than the ordinary strength of character and intellect. When he was about five years of age, the family migrated to Caton in the state of New York, and there his boyhood and early youth were spent on a farm, with resultant strengthening of muscle and sinew, and of mental fiber. After passing through the usual routine of a district school he entered an academy at Canandaigua, from which he graduated in 1846, and then, having chosen the legal profession, entered the law office of E. C. Lapham, afterwards a United States Senator, where he pursued his studies until 1848, when he was admitted to the bar. Opening an office at Corning, New York, he continued in practice there until 1855, when he came to Winona in this state, then a straggling embryotic village, with the rough aspect and rougher ways of a frontier settlement, but with unlimited expectations. Previously, in 1850, he had won the hand in marriage

of Miss Frances Eliza Hubbell, daughter of the late Philo P. Hubbell, then residing in Corning—a most excellent woman, whose constant affection and devotion sustained and encouraged her husband in his various labors and activities, and cheered and comforted him when his end drew near. One child only blessed the union—a daughter. The young couple took a prominent place among the pioneers in the early days of Winona, and as time went on gathered about them a large circle of friends, to whom their hospitable home was always open.

On reaching Winona, General Berry resumed the practice of his profession, and pursued it with unflagging zeal and a large measure of success, until his ability was recognized by President Cleveland during the latter's first term, by an appointment to a territorial judgeship in Idaho. The lamented Judge Waterman was formerly associated with him in professional work, the partnership continuing until Waterman ascended the bench of the Third Judicial District in January, 1872. Later he formed a copartnership with C. A. Morey, his son-in-law, under the firm name of Berry & Morey, and this connection was dissolved only by his death, though in the later years of his life, the General, by reason of his failing health, participated in the practice of the firm less actively than he previously had done.

From the outset of his career in Minnesota he took a prominent part in political and public affairs. At the election of October 13, 1857, at which the constitution of the state was adopted, and the first state officers chosen, he was a candidate for the office of attorney general and was elected. Taking the oath of office on May 24, 1858, thirteen days after the passage of the act of congress formally admitting the new commonwealth into the union, he held the position until the first Monday in January, 1860, at which time, agreeably to the provision of the constitution touching the tenure of the first state officers, his term expired. During his incumbency many important and difficult questions, incident to the transformation of the territory into a state, and to the rush of new public or semi-public enterprises demanded his attention, and were met and decided with promptness, and with ready grasp of the merits. In some of the opinions there is noticeable a vigor of expression which

was not only characteristic of the man, but indicative of intense interest in the points at issue. The longest and perhaps most interesting of these was given in answer to an inquiry from Governor Sibley relative to the issue of first mortgage bonds by the land grant railroad companies. Later he served the state in other capacities. He was for several terms a senator from Winona county; at one time a member of the board of directors of Normal Schools, and finally a member of the State Board of Corrections and Charities.

To his judicial duties and responsibilities in Idaho General Berry brought the same energy and industry that had characterized him as a practitioner, and exerted a great and far-reaching influence in moulding the jurisprudence of the territory during the period immediately preceding its admission to statehood. Especially notable among his decisions was one sustaining the validity of the Edmunds law, which was affirmed by the supreme court of the United States and aided largely in the suppression of polygamy among the Mormons. But the labors and exposures to the inclemencies of weather incident to the discharge of his judicial duties in a sparsely settled country affected his health injuriously; so that upon his return to Winona, at the expiration of his term of office, he found it necessary to lead a more retired life. Nevertheless he was a familiar figure upon the streets until his increasing physical infirmities forbade him, during the final few months, to leave his home. He approached the grave without fear, and yielded to the inevitable without murmuring, expiring on August 21, 1900.

Such are the outlines of the life of our late associate and friend. But how inadequate is a mere sketch like this. How far short it falls of showing all there was in the man and in his life. The salient points here jotted down are but the setting of stakes, so to speak, marking the general course of his earthly pilgrimage. To complete and round out the record of all he was and did, the intervening spaces must be filled with the thousand and one little incidents in his career, the graces and peculiarities in his character which distinguished him from the general mass of men, the various and numerous slight indications which, grouped together, would index the whole man. No two human beings, no

two human lives, are precisely alike; and a full description and record of each life that, like General Berry's is worth the trouble, would make a book. We must, then, be content with a cursory view. Certain it is that our deceased friend was a man of far more than ordinary mark. He made, and he has left, an impress not only upon the particular community in which he lived and wrought, but upon the great state whose history he helped to make. He was indeed a notable personage. His innate dignity and self-respect found expression in stately demeanor and grave courtesy, fitly matched by an imposing form and carriage. He was one, especially in his later years, at whom the passer-by must turn to look with respect and a feeling akin to reverence.

Until impaired health in a measure crippled his energies, his was a strenuous life. The spirit within him was too active, too eager, to permit of an even and quiet tenor of way. In whichever of the world's activities he took part it was his disposition to be at the fore. When interested in any pursuit or enterprise all his powers, mental and physical, were brought into play. While not offensively self-assertive, he never lagged timidly at the rear. He had moral courage. His opinions were not hidden. He never shrank from opposition. In his profession he was a vigorous and indefatigable advocate; in public affairs he was combative and insistent in urging whatever he believed to be for the public weal. Yet he was a kindly soul. Beneath a sometimes bristling exterior beat a good heart. Though in life's battles he met antagonists bravely, though he brushed obstacles from his path with unyielding determination and force, he never resorted to unfair or ignoble expedients, nor did aught through malice, and he died at peace with all men.

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Hon. William H. Yale then addressed the court as follows:

"The state of Minnesota as a commonwealth is the outgrowth and the production of the last half of the nineteenth century. The brains and the energies which laid the foundations of this state, so broad and so sure, came from the young men who in the early fifties left their eastern homes in the towns and cities a thousand

miles away, and came to a portion of the country which was at that time an almost unbroken wilderness.

"Migration has been part of the history of the nations of the world from time immemorial. Centuries before the commencement of the Christian era the young men of ancient classic Greece went out from the cities and towns of that then scholarly country to colonize the islands of the Ægean Sea and the north coast of the great unknown continent of Africa. Five hundred years later Rome, the eternal city, sent out her armed hosts to colonize France, Great Britain and Northern Europe. Coming down to more modern times one's mind reverts to that period in the history of our own country, not quite three hundred years ago, when a band of exiles left their homes in England, bid good bye to their native shores and starting out on that long and perilous voyage to cross the almost unknown ocean of which they knew little, to try and reach a country of which they knew less, finally, at midwinter, landed at Plymouth Rock. So, too, the young men who left their homes in New England and the other eastern states in the early fifties, and came to this great undeveloped region embraced in the territory now called Minnesota, like our Pilgrim fathers were blessed with but little of this world's goods; but like our Pilgrim fathers were endowed with high hopes, honorable ambitions, and guided by a realizing sense of their duties to their fellow men, and those who were to follow them, laid the foundations of Minnesota in a broad, solid and substantial manner. They shaped the course of the future state in a fashion to which all of us can point with exultant pride and complacent satisfaction.

"Charles H. Berry was one of the young men who came to Minnesota at an early day, and selected the then little village of Winona to commence the laborious work of his chosen profession. It is claimed by some that environment does more for men than heredity. About the same time that General Berry started in his practice, four other young men, who had left their distant homes, located in the same little town, laborers in the same calling: Hon. William Mitchell, who for nineteen years was an honored member of this bench, whose death we so recently mourned; Hon. Thomas Wilson, who for a series of years was chief justice of this court,

who having passed the three score and ten years of life, is still with us, honored and respected throughout the state for his great ability and his sterling integrity; Hon. Daniel S. Norton, who for five years, and until his death, occupied a seat in the senate of the United States; and the remaining one of the four, Hon. William Windom, for many years a member of the United States Senate, died while occupying the high position of secretary of the treasury in President Harrison's cabinet.

"These were some of the young men who were the neighbors and contemporaries of General Berry, in his and their younger days; they were among his opponents in the litigation of territorial times. Each listened to the other in expounding the various questions of law arising in those early days, many of which were new to all of them. With Berry on one side and any of the other four on the other side, you could certainly count on its being a right royal contest. If then environment contributes to the making of the man, General Berry was indeed fortunate in having four such men for his daily companions, four such men to meet so often in forensic debate, and to contend with before courts and juries. As the contact of flint and steel produces fire, so does the association of brilliant intellects evolve the spark which otherwise might have remained dormant, undeveloped and undiscovered. With what abler quartet of men in the state could General Berry have been surrounded, and who can to-day estimate the influence of these five men in the early history of the territory and of the state? What town, village or city of Minnesota that was not benefited by that aggregation of five scholarly and energetic citizens, who were among the leaders at the bar, leaders in the councils of our state, and among the leaders in the councils of our nation?

"When Minnesota dropped the swaddling clothes of her territorial days to put on her more mature and more majestic robes of statehood, Charles H. Berry was called on to be Minnesota's first attorney general. It was a responsible position, which required on his part legal acumen, unfaltering courage, and judicial discretion to guide our infant state through the first years of its existence. General Berry performed the duties of that office with



honor to himself and with dignity and credit to the state of Minnesota.

"Subsequently President Cleveland appointed General Berry as one of the judges for the territory of Idaho. The people of what was the little town of Winona in the early fifties, now grown to be a city of twenty thousand people, where General Berry had lived for more than forty years of his life, among those who knew him best, men of all political parties, were unanimously of the opinion that his appointment as United States District Judge was highly creditable to President Cleveland, very desirable for the people of that territory, and a compliment to General Berry, which he had honestly and fairly won by forty years of constant and laborious practice in his chosen profession, in the city of his adoption.

"There is one other phase in the life of our deceased brother which commends him to those who knew him best, and that was his warm love and gentleness in his own family. I have often visited in that very hospitable home, during the last forty years, and I say knowingly no one ever heard our deceased brother utter an unkind or angry word in the presence of his wife or child, or under that roof which was his home from early days to the day of his death. He undoubtedly had his trials, his crosses, and his discouragements as we all have, but he bore them bravely, manfully, and courageously. His aged widow, his daughter and his grandchildren, whom he loved so dearly, mourn the loss of him who was so kind and loving to them; for amid all the excitement and worry of his professional duties, amid all the cares and vexations of a busy life, his face was all smiles to his dear ones and to them his words were words of tenderness, thoughtfulness, and love. The little mound which marks his last resting place in God's acre will be very precious to them; and we, his contemporaries who knew him so well, rejoice that on this solemn occasion we can say nothing but good of our distinguished brother, whose death we all sincerely mourn.

" 'Brothers, God grant that when this life is o'er,  
In the life to come we shall meet once more.' "

Hon. George P. Wilson then addressed the court as follows:

“May it please the Court:

“My residence in this state goes back to a period in its history when the pioneers, the men who held membership in the territorial legislatures, the men who formulated the constitution, and had participated officially in the territorial government, as well as in the earliest years of the state government, were still, with very few exceptions, in active life. With the passing of the years, many of them have fallen by the way. Some have ever since been prominent in the councils of the state, and are to-day honored and respected by all who know them. But these fathers of our commonwealth cannot tarry with us much longer. Within the past few weeks two of the very earliest settlers in the St. Croix valley, the Hon. John McKusick, of Stillwater, and the Hon. W. H. C. Folsom, of Taylor’s Falls, have passed away. The morning papers announce the death last night of the Hon. Ignatius Donnelly.

“I have often thought that the labor of these pioneers has not been properly appreciated by those who have followed them, and have reaped the fruit of their labors. We owe a greater debt to them than we are prone to acknowledge. They did their work under conditions entirely dissimilar to those which have existed during the past quarter of a century, and yet they did it wonderfully well. They had to create. We follow precedent. They served the state under hard conditions, without the aids or helps which have come to us in later years. We know historically, and, indeed, from the lips of living witnesses, the extreme hardships which prevailed during the years 1857, 1858, 1859, 1860 and 1861. With many it was a life and death struggle, and men less heroic than they would have given up in utter despair. Men cannot do their best work under such conditions. And yet, how few mistakes were made. In fact, none which seriously imperilled the general welfare of the people.

“It is a matter of congratulation to every citizen that the affairs of this commonwealth, from the very beginning, have been, in the main, honestly and wisely conducted. But the heaviest burden fell upon those who had to do with the affairs of state in its for-

mative period. Among these was he in whose memory we have met to-day. During his administration of the attorney general's office, and during that of Attorney General Cole which followed, many new, important, and exceedingly vexatious questions were presented for solution. It is no disparagement to their successors in that office to say that thereafter the duties of that office were more of a routine character. Many disputed and doubtful questions had been settled either by legislation or by the decisions of this tribunal.

"I first met General Berry late in 1860. He had but recently retired from the attorney general's office, and was in the vigor of his early manhood, and in the full maturity of his powers. He was accounted by all who knew him as an able and very aggressive lawyer. He then stood in the forefront of his profession, and maintained his standing for many years. His reputation was more than state wide. His services were in great demand. He especially excelled as an advocate. He had great felicity of expression, and revelled in debate. He enjoyed every minute of the time when engaged in a trial, and the hotter the contest, the keener his enjoyment. He had great skill in distinguishing cases which were against him, and in fighting his way out into the open where he could renew the contest on more equal terms. Shortly after my admission to the bar, I met him, as opposing counsel, in justice's court. His ability and experience were disastrous to the interests of my client. With some indignation at the result, I expressed to him my surprise that he would come into that court and usurp that which I thought properly belonged to the younger men in the profession. I remember his answer as well as if he had spoken it but yesterday. He said: 'I shall never despise the bridge that carried me over.'

"General Berry was an honest man, and this is the highest praise that can be bestowed on the living or the dead. All who knew him well will gladly bear testimony to his upright character and good citizenship. I esteem it a privilege, as well as a pleasure, to pay to his memory this informal and very slight tribute."

Hon. Charles C. Willson then addressed the court as follows:

"General Berry was of Huguenot stock. The revocation in 1685 of the Edict of Nantes sent his ancestors to the New England colonies. He was born September 12, 1823, in the town of Westerly on the extreme southwest coast of Rhode Island. He was taken by his parents while yet a child to Steuben county in western New York. There, in the rude school houses, amid hills and hemlocks he studied, and then taught. The public money appropriated by the state for common schools there was mostly paid those teachers and was the chief reliance of such of them as were ambitious of professional life. The larger number of the lawyers, doctors and clergymen, then of western New York, had taught school. The immigrants who settled that densely wooded country were mainly from New England. They were poor and unable to send their children to distant and better schools. Their energies were directed to cutting down and burning off the beech, maple, and hemlock forest. In this work General Berry in his youth bore his full share. But he had formed an unswerving purpose to fit himself for the bar, and to bear an honorable part in the profession. In the pursuit of this ambition he was compelled to practice self denial, untiring industry, and rigid economy.

"He studied law at Canadaigua in the office of United States Senator E. C. Lapham, and was admitted to the bar at Rochester in 1848. He was full six feet in height and stood erect, well poised, of graceful and commanding aspect. He hung out his sign in gilt letters, with high hope and confidence, at Corning. He soon felt the discontent of a young lawyer at the foot awaiting the slow progress of advancement among older and experienced advocates; and in May, 1855, he came to Winona, where all like him were young, and there he spent the balance of his life. His kindness of heart, his evenness of temper, and his rugged integrity attracted friends. In his office the schemes for local improvement, the affairs of the town, the school, and the church were discussed and digested. To their solution he applied the sound and homely maxims which early privation had enforced upon him. He was a type and example of that considerate, but stern and resolute, manhood

that came in and subdued the vast country west of the Great Lakes. This new empire of the northwest in hands like his has now become invincible in power, excellent in honor, and admirable in justice. For every place of office or trust, hundreds were competent, and accident or trivial circumstance determined the choice among them. Opportunity only was lacking to bring forth many a latent statesman or jurist, who now sleep in country churchyard, unhonored and unknown.

"Office and power bring toil, and care, and the weight of responsibility. He sought them not; he shrank not when called. He was the first attorney general elected to advise this court in the administration of criminal law. He performed that duty to the satisfaction of all, and it is appropriate that this memorial be entered in your records.

"He was self made. In his younger days the modern law school was unknown. Those schools now annually send forth their swarms of new-fledged lawyers to settle down upon the land and wait for business that is slow to come. Disastrous would it be to the country were there ample lawsuits for them all. But the Anglo-Saxon spirit of unrest is in their blood, and some will journey as did General Berry out and on, seeking elsewhere that success which comes so slowly in the courts at home. Fertile and vacant lands within our home domain no longer can be found, and some of these young men will go beyond the western seas to find on distant shores that fortune that eludes them here. Nothing can prevent. There let them keep in mind the character of him we honor here to-day. Purity of life, nobleness of purpose, courage to pursue the right, bring honor and success in every country and in every clime."

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The following letter from Hon. Isaac Atwater was then read:

"I am in receipt of your letter of the 12th inst. inviting me to be present at the memorial exercises before the supreme court of Minnesota, in relation to the death of General Charles H. Berry, the first attorney general of the state of Minnesota, and to make an address or some remarks on that occasion. I was very well acquainted with General Berry, and highly esteemed him for his

acknowledged legal abilities, and the conscientious and satisfactory manner in which he discharged the duties of that important office while he filled it; and, were it possible, it would be a mournful pleasure to render such tribute to his memory on that occasion as I might be able and the opportunity most appropriately justifies. But the infirmities of 83 years (attended by rheumatism and paralysis) forbid even the hope of my being able to be present on that occasion, and with most sincere regrets, I remain,

Yours truly,

I. Atwater."

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Hon. Charles E. Flandrau then addressed the court as follows:

"May it please your Honors:

"I have been chosen to express the sentiments of the Bar of Minnesota on the recent death of one of its oldest and most esteemed members, General Charles H. Berry, of Winona. The very frequent recurrence of similar events in the past few years has nearly extinguished the old territorial bar, leaving scarcely enough members to perform the functions of sepulture for the departed. My being one of the few remaining, and an intimate and devoted friend of General Berry, no doubt enters largely into the reason of my selection to assist prominently in these ceremonies. In accepting the duty I am actuated neither by sorrow nor pleasure, but a sentiment which partakes of both—sorrow for his afflicted family, and pleasure in the knowledge that he leaves behind him that legacy most valuable to posterity, the record of a long life of honor and useful achievement.

"If life had no limitations, death would be a calamity at any time and under any circumstances, but as its usefulness and pleasures are confined to the period of three score years and ten, with a possible brief marginal extension, the man who fills out that bound has usually lost his public usefulness, becomes separated from his old-time friendships by death and the rise of a new generation, and has nothing left to bind him to life save the indestructible ties of family love. Is it not better that he should surrender, to live in the loving remembrance of his friends for the good he has accomplished? I envy the dead who peacefully die in honor, yielding to the inevitable. Here there is no place for sorrow.

“Death is the crown of life;  
Were death denied, poor man would live in vain.  
Death wounds to cure; we fall, we rise, we reign;  
Spring from our fetters, fasten to the skies,  
Where blooming Eden withers from our sight.  
The king of terrors is the prince of peace.’”

“The ties that bind men together in this life and lay the foundation for undying friendships are various, but none are stronger or more enduring than those growing out of pioneer associations and mutual endeavors in the building up of new communities and states. There population is sparse, and the actors are brought into closer and more intimate relations. The objects of attainment are more conspicuous and important than the general pursuits of life, and the results of victory more valued and memorable than those which follow the maintenance of the consummated and matured state.

“I think it may generally be assumed that the young man who leaves the ancestral home to seek his fortune among the unorganized and somewhat chaotic people of the frontier, possesses the elements of progression and enterprise to a greater extent than the youth who is satisfied to pass his life in following the ruts marked out for him by his ancestors, and I know that when he is embarked in the work of state building his intellect expands, and his character matures with infinitely more rapidity than would have been possible under the influences left behind him. He is brought face to face with original governmental issues that would not have engaged his attention in an old community until the passing away of the generation which preceded him. The field for the exercise of his genius is virginal and attractive, and calls for the expression of his originality. General Berry, when a young man, was of this class. In the very infancy of Minnesota's territorial existence he sought the advantages it presented to the ambitious youth and settled in Winona in the year 1855, when the town had hardly gained a place in the geography of the northwest. Here he commenced the practice of the law, and so successfully did he establish himself in the profession, and in the esteem of the people of the territory, that at the first democratic convention which met in

1857 to select officers for the coming state, he was chosen for the distinguished position of attorney general, to which office he was elected at the ensuing election, and performed its important and responsible duties for the period of two years with credit to himself and satisfaction to the state.

"I became acquainted with General Berry almost immediately on his arrival in the territory, which acquaintance soon ripened into a close and warm friendship and was strengthened by the fact of our both being members of the first administration of the state government, he as attorney general, and I as associate justice of the supreme court. So near were we to each other that I always addressed him by the intimate and endearing term of 'Charley.' Our official relations, of course, afforded me the best opportunities to measure his mental and professional ability, as well as his general standing among men, and I rejoice to say that he adorned every station which he occupied in life. In the practice of the law he was associated with Judge Waterman until the latter was elevated to the bench of the district court in January, 1872. During the first term of President Cleveland's administration his fitness for the judiciary of a new and growing country was recognized, and he was appointed one of the associate justices of the Territory of Idaho, which position he filled with entire satisfaction and much ability until the territory was admitted into the Union of the States, with which event his judicial career expired. General Berry then returned to his old home at Winona and resumed the practice of the law in partnership with his son-in-law, C. A. Morey, which connection continued until his death on August 21, 1900, in his seventy-seventh year, he having been born at Westerly, in the state of Rhode Island, on September 12, 1823.

"General Berry was a tall slender man of graceful and dignified carriage. Before coming to Minnesota, and in 1850, he was married to Miss Frances Eliza Hubbell. One child only was born to them, a daughter.

"General Berry was particularly fortunate in having chosen Winona as his residence, as it brought him in touch with a bar of high standing and phenomenal ability. There he was associated with William Mitchell, who became and remained an associate



justice of the supreme court of Minnesota for many years; Daniel S. Norton, who represented our state in the senate of the United States; Eugene M. Wilson, who went to congress; William Windom, who was a member of congress, United States senator, and twice secretary of the treasury of the United States; and Thomas Wilson, who became chief justice of our state; besides other lawyers of great prominence. A man who shone brightly surrounded by such luminaries was necessarily a light of magnitude.

"General Berry was independent in his views and opinions, political and otherwise, and positive and decided in their maintenance, but never obstinate nor offensive. He was generally respected and beloved, and during his long residence in Winona occupied a commanding position among his fellow citizens. In his latter years his appearance was quite patriarchal from his wearing a long and flowing white beard. His health began to fail some years before his death and compelled him to lead a less active life, and for the last few months his once familiar, stately, and distinguished figure was seen no more on the streets. He lived a model life, and died in the midst of a loving family. No citizen of our state who has gone before or will follow him can hope for more.

"What is it to die? To live without the pain.  
What is it to end but to begin again!  
And that repose that follows on the strife  
But preparation for succeeding life.'"

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At the conclusion of these addresses the following response was made upon behalf of the court:

CHIEF JUSTICE START then said:

"Gentlemen of the Bar:

"Your memorial is a just tribute to the memory of Minnesota's first attorney general, Judge Berry, and eloquently expresses our own estimate of his life and character. His standard of life was high, and in every relation he was true. He was a generous and loyal friend, and a dignified and consistent foe of those who

wronged him and failed to make amends. There are men who know what is right and would like to be true to their convictions of duty, but fearing the 'frown of the great' or hoping for some prize which ambition covets, they cowardly or dishonestly stifle their convictions.

“‘And crook the pregnant hinges of the knee  
Where thrift may follow fawning.’

“Judge Berry had no such weakness, nor had he the dissembling self restraint of the trimmer. He loved right and hated wrong with every fiber of his being, and with a splendid courage he ever upheld the right and denounced the wrong, regardless of consequences to himself. He was an able lawyer, a just judge, and a man in public and private life of unquestioned purity of character. It is proper then as a tribute of respect to his memory that your memorial should be recorded in the records of the court for the day and that the court should now adjourn. It is so ordered.”



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF MINNESOTA.

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W. D. HASLAM v. FIRST NATIONAL BANK OF MINNEAPOLIS.<sup>1</sup>

January 24, 1900.

Nos. 11,837—(185).<sup>2</sup>

**Transfer of Stock Certificates—Pledge.**

Action by an alleged owner of stock against a bank for damages for failure to transfer the stock upon its books. Claimed by intervenor that he had acquired the stock by virtue of a sale thereof under execution against the vendor.

**Verdict Sustained by Evidence.**

Evidence examined, and *held* to support the verdict.

**Charge to Jury.**

Charge of court upon question of ownership of stock examined, and found to contain no error.

Action in the district court for Hennepin county to recover \$9,000 damages for refusal to transfer stock. John C. Oswald intervened, claiming title to the stock. The case was tried before Harrison, J., and a jury, which rendered a verdict in favor of intervenor; and from an order denying a motion for a new trial, plaintiff appealed. **Affirmed.**

*Henry J. Gjertsen and Frank K. Pratt*, for appellant.

*Chas. G. Laybourn*, for respondent.

<sup>1</sup> See note on page iv, *supra*.

<sup>2</sup> October, 1899, term.

LEWIS, J.

The plaintiff brought this action against the First National Bank of Minneapolis to recover damages for its refusal to transfer upon its books two certificates of stock of said corporation alleged to have been issued to John Schulte, and purchased by plaintiff. John C. Oswald intervened in said action, claimed title to the stock by virtue of a sale under execution against said Schulte, and demanded judgment that the stock be transferred to him upon the books of the bank. At the time the cause came on for trial in the court below, the following stipulation was entered in the record:

"In order to relieve the defendant bank from further participating in the trial, it was agreed between all the parties that: If a verdict was for the plaintiff, the verdict shall be in the form that, 'Plaintiff is the owner of the shares of stock described in the complaint, and that the defendant bank deliver to the plaintiff new certificates for the said 80 shares.' If the verdict is for the intervenor, then it shall be in the form that, 'The intervenor is the owner of the 80 shares of stock described in the complaint, and that the defendant bank deliver to the intervenor new certificates for the said 80 shares.'"

It was further agreed that the value of the stock should not be determined. The trial resulted in a verdict for the intervenor, and plaintiff appeals from an order denying a new trial.

Of the many assignments of error, it is necessary to consider only the following:

1. Those which go to the sufficiency of the evidence to sustain the verdict. The plaintiff introduced no evidence except the certificates of stock in question, with the indorsements thereon, and the bills of sale purporting to transfer the same by Schulte to the plaintiff. Depositions of the plaintiff and of Schulte taken on behalf of the plaintiff were offered in evidence by the intervenor, and this was all the evidence upon the question of the sale of the stock by Schulte to plaintiff. Appellant contends that these depositions do not contain any evidence tending to show a fraudulent or void sale of the stock to plaintiff. We have read them carefully, and considered them in relation to the other evidence in the case, and are unqualifiedly of the opinion that the verdict is supported by the evidence.

2. The court charged the jury as follows:

"\* \* \* If you find from the evidence in this cause, and under this charge, that the said John Schulte was the owner of said 80 shares of stock at the time of the levy of said attachment, then the title to said 80 shares of stock, or to whatever interest therein was then owned by said Schulte, passed to said John C. Oswald by virtue of said attachment and said execution sale, and you should return a verdict that the intervenor is the owner thereof. But if, on the contrary, you find there was a valid and bona fide sale of said stock to said plaintiff, Haslam, prior to the levy of said attachment, then you should return a verdict that the said Haslam is entitled to, and is the owner of, said 80 shares of stock. The parties have agreed upon two forms of verdict which will be delivered to you,—one a verdict finding the plaintiff, Haslam, to be the owner of said shares of stock; and the other a verdict finding said John C. Oswald, the intervenor, to be the owner of said 80 shares of stock."

To this part of the charge appellant attempted to except, as follows:

"Plaintiff also excepts to that portion of the charge in which the court instructs, \* \* \* If the jury should find that Schulte secured a loan from the plaintiff, and pledged the stock simply as security for such loan, then the title of Schulte passed to John C. Oswald upon the execution sale. The Court: I did not so instruct the jury. Mr. Gjertsen: Well, the point I desire to make is that I take an exception to that part of the charge where the court instructs the jury that if Haslam, the plaintiff, was simply a pledgee of the stock, that the intervenor secured a title to the stock, against him, upon the execution sale. The Court: I did not so charge them."

Conceding that the exception taken is sufficient, we will consider whether there was error. It is claimed by appellant that this exception was intended to apply to these words employed by the court, "\* \* \* or to whatever interest therein was then owned by said Schulte, \* \* \*" and that these words, taken in connection with the context, amounted to a direction to the jury to return a verdict for the intervenor if they should find that the plaintiff held the stock as pledgee.

Authorities are cited to the effect that a pledgee of stock may sue upon the same in his own name, and for this reason appellant assumes that in this action in no event could the intervenor acquire

a greater interest than Schulte had if the stock were held by plaintiff in pledge, and not as owner. True, the plaintiff, upon the facts alleged in the complaint, could maintain the action, as against the bank, whether he be pledgee or owner in fact. So far as the bank is concerned, the pledgee was owner, and it was sufficient if the complaint alleged that he was owner. But after the intervenor pleaded in the action an issue was raised directly upon the validity of the sale by Schulte to the plaintiff. It was alleged by the intervenor that the so-called transfers of stock were without consideration, and were made for the purpose of enabling plaintiff to recover from the bank for the benefit of Schulte. Such being the condition, it was incumbent upon plaintiff to take such course as would apprise the court and the intervenor that the plaintiff intended to claim title as pledgee, and not as owner. By entering into the stipulation as to the form of verdict, and in proceeding all through the trial upon the theory of ownership, the appellant cannot complain of the language referred to. Again, it is doubtful whether this reference by the court to the interest then owned by Schulte had any application to the supposed interest of plaintiff as pledgee. The court submitted the issues to the jury in accordance with appellant's theory of the trial, and we do not find any error in the charge.

Order affirmed.

## EDWARD G. ROGERS and Another v. CITY OF ST. PAUL.

January 24, 1900.

Nos. 11,908—(180).

79	5
e79	38
79	5
e86	100
f86	101

**Assessment for Local Improvement.**

The city of St. Paul, in 1891, instituted proceedings to grade East Third street from Earl street to the east city limits. Assessments were levied upon abutting property upon the rule of benefits. A contract was let for the improvement, and a great deal of work performed at different points, but the street was left for some distance to the west of plaintiffs' property in a less passable condition than before, and access to said property from the heart of the city was cut off by failure to complete the work. Plaintiffs' property was assessed in the sum of \$4,706.94, and in default of payment the premises were sold to a third party for the amount due. After the work mentioned was performed, the defendant, on September 27, 1893, rescinded the grading contract. No more work was done towards completing the improvement. The plaintiffs' property was not benefited by the work as done.

**Complaint Defective.**

*Held*, in an action brought by the property owners to recover from the city the money so received, it not appearing from the complaint that all of the money accruing from the assessment had not been expended upon the improvement, that the complaint (setting up the above-mentioned facts) does not state a cause of action.

**Sale of Property for Assessment.**

*Held*, conceding the complaint to be otherwise sufficient, the fact that the property had been sold by the city to satisfy the assessment did not deprive plaintiffs of their right of action.

Appeal by defendant from an order of the district court for Ramsey county, O. B. Lewis, J., overruling a demurrer to the complaint.  
**Reversed**

*James E. Markham* and *Franklin H. Griggs*, for appellant.

Even assuming that plaintiffs had paid the assessment, they cannot recover except upon a showing that the money has not been devoted to the purpose for which it was raised, but that it still remains in the city's treasury. The court in *McConville v. City of St.*



Paul, 75 Minn. 383, did not have its attention drawn to the determining fact, that the money raised by assessment to defray the expenses of the improvement had all been expended in that undertaking. This is a most important consideration in the case at bar. In none of the decisions on which the court based its holding in *Valentine v. City of St. Paul*, 34 Minn. 446, which was followed with certain modifications in *Strickland v. City of Stillwater*, 63 Minn. 43, and in the *McConville* case, was there an instance where a valid assessment was required to be refunded. These decisions are *Bradford v. City*, 25 Ill. 411; *Falls v. City*, 58 Ill. 403; *Mayor v. O'Callaghan*, 41 N. J. L. 349; *Peyser v. Mayor*, 70 N. Y. 497.

Under the provisions of a charter like that of St. Paul, and in a jurisdiction where assessment proceedings are not in pais, as they are in most states, the reason for the rule laid down in the foregoing cases and distinctly approved in the *Valentine* case is of extreme importance. Properly applied it leads to this: When the municipal authorities of the city of St. Paul levy an assessment of benefits to defray the expense of an improvement, the money paid into the treasury in those assessment proceedings is in the nature of a fund which is held in trust by the public and which is devoted to a specific purpose from the accomplishment of which it cannot be diverted. Equity would interfere by injunction to prevent its diversion or by mandamus to compel its proper application, and to insist upon the accomplishment of the purpose to which the fund had been devoted.

If a fund charged with a trust, such as suggested, is in the hands of the municipal authorities, and they refuse or neglect to apply it to the purpose of the trust, by abandoning the improvement for which it was raised, they can be compelled to restore the fund to those by whose contributions it was made. If, however, the fund is no longer in existence, but has been properly expended in an honest endeavor to complete the improvement in contemplation of which it was raised, the municipality is not liable in an action for money had and received as for a failure of the consideration of the various assessments,—and such is the case at bar, even assuming that the money which plaintiffs are endeavoring to reach was contributed by them and not by some one else. Nor is this view of the

law applicable to the case at bar at all in conflict with *Valentine v. City of St. Paul*, supra; *Strickland v. City of Stillwater*, supra; or even *McConville v. City of St. Paul*, supra; it is rather supported by those cases. If the fund has not been expended, it is for the plaintiffs here to show.

In any event plaintiffs cannot recover, for the reason that they have suffered no injury. The plaintiffs do not appear before the court as owners of property along the line of the proposed improvement who have paid an assessment of benefits levied to defray its cost. Plaintiffs are not entitled to recover the amount paid to the city treasurer by Heyderstaedt until they have taken whatever steps may be necessary to protect the city from a further liability to Heyderstaedt himself for the same money which they seek to recover. The court will not adjudge that defendant is liable to plaintiffs for what it received from Heyderstaedt, until plaintiffs have shown some interest in his payment; as that the payment was made by him for their use, or that he was their agent in making the payment. Something must be done by them towards showing that they, and not he, are the real parties in interest.

*H. J. & A. E. Horn*, for respondents.

The case is ruled by *McConville v. City of St. Paul*, 75 Minn. 383, which appears to have been based upon the equitable right of the owner of the property to claim the amount paid for the assessment, as upon a failure of consideration. It is immaterial, however, whether the city has used the money or not. The ground upon which the city received it was that plaintiffs had been benefited, or would be benefited upon the completion of the improvement, to the amount of the money received by the city. The special benefits which plaintiffs would have received, if the improvement had been completed, are essential to the right of the city to make the assessment on plaintiffs' property. *Norwood v. Baker*, 172 U. S. 269, 279; *Pimental v. City*, 21 Cal. 352, 362; *Newman v. Board*, 45 N. Y. 676; *Prichard v. Budd*, 42 U. S. App. 186; *Colville v. Besly*, 2 Denio, 139, 142.

In assessment cases, especially where the assessment is enforceable by a judgment, the party whose property is assessed does not

consent thereto merely by paying the assessment, or in other words, such payment is not voluntary. Plaintiffs have not forfeited their right to recover by reason of not having redeemed from the sale. The city has no ground of complaint on this account, because it has already collected the money for the assessment, and a redemption by plaintiffs would not have been a payment to the city on the assessment. Such redemption money would be held by the city, as trustee, to pay the same over to the purchaser at the sale, and the city had no interest in the matter. Heyderstaedt has apparently no ground of complaint, because he purchased the property voluntarily at the sale, and by this time has the right to an absolute title. His position is different from that of plaintiffs. He was a volunteer. Neither is the fact that the plaintiffs may have allowed the sale to become absolute, instead of redeeming, material. They are suing for the money which was made out of their property. Their recovery cannot affect the title of Heyderstaedt or his rights. The rule of caveat emptor applies to him, and he can claim nothing from the city but the title acquired at the sale. 2 Desty, Taxn. 850; Lynde v. Inhabitants, 10 Allen, 49; Churchman v. City, 110 Ind. 259; Pennock v. Douglas, 39 Neb. 293.

There being no obligation, in the absence of the statute, on the part of a municipality to refund money received from a volunteer purchaser at a void sale, there would be no obligation to refund money paid at a valid sale by such a purchaser, who has acquired a good title to the property sold, though his speculation is not as profitable as he anticipated by reason of the failure of the city to complete the improvement. The city has not executed to Heyderstaedt any warranty or guaranty that it would prosecute or complete the work. The only remedy of the certificate holder, given by the statutes, is where the deed and certificate of sale are set aside in a judicial proceeding. Sp. Laws 1887, c. 7, § 50, as amended by Sp. Laws 1889, c. 32. Heyderstaedt has no right against plaintiffs to compel them to redeem from the sale, or to pay him back his purchase money, nor have plaintiffs any rights or remedy against Heyderstaedt. Plaintiffs were justified in delaying suit, so as to give the city time to complete the improvement, if so disposed. McConville v. City of St. Paul, *supra*.

LEWIS, J.

The complaint, in substance, alleges that on August 18, 1891, the defendant instituted proceedings for condemning and taking an easement in the land abutting on East Third street from Earl street, a mile and a half west of White Bear avenue, to the east city limits, a total distance of two and a half miles; that this easement was deemed necessary for the construction of cuts and fills in grading East Third street for this entire distance, the easterly mile of which had not been opened as a street until January 20, 1891; that this grading had been ordered as a single improvement; that the expense of the same was estimated and ordered to be assessed as a single improvement upon the property benefited, as provided by law; that, in pursuance of such proceedings, on March 29, 1892, a contract was duly entered into between said city and Keough & Donnelly to do the entire work by October 31, 1892, for the sum of \$47,000, and to meet such cost an assessment according to benefits was made upon the abutting property, including the property of plaintiffs; that plaintiffs' property was assessed in the sum of \$4,706.94; that thereupon judgment was rendered, and entered in the district court for said sum, with interest and costs, and that said property of plaintiffs was duly sold on August 1, 1892, to F. V. Heyderstaedt, for the sum of \$4,754.50, which amount was paid by said Heyderstaedt into the treasury of said defendant, and that said defendant ever since has had the full benefit of said payment and money; that said contractors commenced said work approaching a point between Clarence and Flandrau streets, a considerable distance west of White Bear avenue, and in the vicinity of plaintiffs' property; that between Clarence street and Birmingham street, which streets intervene between Earl and Flandrau streets, there was a deep hole, with gradually sloping approaches, before said contractors began work at that point, and that at another point in that vicinity there was a high bank, which it was possible to traverse; that the contractors did some work upon this hole and embankment, but left it in a worse condition than they found it, thereby rendering plaintiffs' property impassable by that street from the west; that no work whatever was done east of Flandrau street, and that the effect upon plaintiffs' property was a damage instead

of a benefit. The complaint further alleges that said contract with Keough & Donnelly was rescinded by the defendant on September 7, 1893, and that said work and improvement was never resumed or completed, and has been permanently abandoned by defendant;

"That, had said improvement been completed as projected, access to plaintiffs' property from the center of St. Paul to the east city limits would have been secured therefrom, and said property would have been benefited thereby to the amount of the assessment imposed thereon as aforesaid."

To this complaint the defendant interposed a demurrer upon the ground that it did not set forth a cause of action. Demurrer overruled. Defendant appeals.

The plaintiffs place their right to recover distinctly upon the ground of a failure of consideration, and rely for their authority upon three decisions of this court, viz., *Valentine v. City of St. Paul*, 34 Minn. 446, 26 N. W. 457; *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131; *McConville v. City of St. Paul*, 75 Minn. 383, 77 N. W. 993.

In the *Valentine* case the assessment had been levied upon the plaintiff's property to defray the expense of grading a street, and he had paid the amount into the city treasury. Thereafter the proceedings were enjoined by the court, and the whole scheme abandoned. No work whatever was done towards carrying out the improvement, and the city retained the money. The court held that the effect of abandonment by the city of the project for and on account of which only the assessment had been made was that the consideration of the assessment wholly failed, and that an action would lie as at common law for money had and received.

In the case of *Strickland v. City of Stillwater* the city began proceedings for an entire improvement to grade parts of three streets, including that part of a certain street in front of plaintiff's property. An assessment of \$159.61 was levied upon plaintiff's property in accordance with the rule of benefits, to meet the cost of the general expense. For some reason the city abandoned the grading of the street in front of plaintiff's premises, but completed the improvement otherwise. The plaintiff sued to recover the entire amount of the assessment which she had paid into the treasury.

The trial court rendered judgment in her favor for the full amount, but the judgment was reversed in this court upon the ground that the plan of improvement was a general scheme, and it did not follow that, because the grading was not done in front of plaintiff's premises, she was not benefited by the improvement at other points; and hence, if she could recover at all under such circumstances, the measure of damages would be the difference between what she paid and her actual benefits accruing from the work as done. While the opinion discusses at some length the possible rights of parties under such conditions, we need only to ascertain the true grounds upon which the decision rests. The rule of damages adopted by the court below was manifestly wrong, but whether, under the facts presented in the record, plaintiff could recover upon some other rule of damages, we are not called upon to decide.

There are a few facts, however, appearing in that case which must be emphasized, and which clearly distinguish the case from the one before us. First, in the Strickland case the improvement was completed except in front of plaintiff's property, a distance of about 300 feet; second, that the cost of so completing the improvement was decreased presumably in the amount of the sum assessed against plaintiff's property; third, an amount equal to the sum paid by plaintiff was retained by the city in its treasury. Upon this state of facts possibly the plaintiff might recover as for a partial failure of consideration.

The controversy in the case of McConville v. City of St. Paul grew out of the same improvement as is involved in the case now under consideration. In that case the plaintiff, who was the owner of lots abutting on Third street east of Clarence street, paid into the city treasury the amount of the assessment, and, after the work was abandoned, brought suit to recover it, relying upon the authority of the Valentine and Strickland cases. While this court sustained a judgment in his favor, we think that the facts presented in the record, and the facts assumed and conceded to be before the court, make the case quite different from the one presented by the complaint in this action. It appears from the record in the McConville case that the grading had been completed from Earl street east to within a short distance of Clarence street; that the plain-

tiff's property was situated about one-half mile east of Clarence street; and that the city left the street between said points in such condition as not to permit of travel. The court rests its decision upon the authority of the Strickland case, and it appears from the opinion that the facts were assumed to be similar. The court assumed that the city had abandoned that part of the work east of Clarence street, and could not have referred to the part west of that point, because the record showed as stated that the work was completed to Clarence street. Again, it was assumed or conceded, if it does not appear from the record, that the money paid in by the plaintiff was still unexpended, and was retained by the city. In this respect the following language is used in the opinion:

"And with commendable forbearance he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named."

Whatever may have been the actual fact, it is apparent that the decision of the court in the McConville case was based upon the assumption, justified by the express or implied concession of counsel on the argument of the case, that the city, having received and retained the plaintiff's money, abandoned the further prosecution of the proposed improvement. This brought the case within the principle of the Valentine and Strickland cases.

We now come to the complaint in this action, and we find that it does not appear that the work was completed to Clarence street, and the exact position of plaintiffs' property is not stated. It appears that work was done in a general way along East Third street approaching Clarence street, and that the street was rendered impassable to plaintiffs' property by the acts of the city in partially executing the work, and then abandoning its further prosecution. It does not appear whether any work was done in front of plaintiffs' property. On this state of facts we would not be justified in holding that the city had abandoned that part of the work east of Clarence street, as distinguished from the other part. Again, there is no allegation that the money realized on the sale of plaintiffs' property was not expended on the improvement. There are some gen-

eral statements in the complaint to the effect that the defendant retained and refused to pay plaintiffs the money received on the sale, but, when taken in connection with the fact that a large part of the work was done, and no cause for the abandonment being assigned, these statements are too indefinite, and do not amount to an allegation that the money had not been so expended. It would be immaterial, if the city were otherwise liable, whether it retained the money in its treasury, or diverted it to some other use. Defendant could not render itself liable to an action for money had and received by abandoning the improvement, and not expending the money, and then shield itself by using it for some other purpose. The plaintiffs have their right to recover upon the authority of the cases mentioned, if the facts alleged are the same. They have followed the complaint in the McConville case, and have argued and submitted the case upon the supposition that the facts are identical, yet it appears that the facts are not the same.

We are then met with this question: Can plaintiffs recover, assuming that the city did not complete any special part of the work,—did not abandon any special part as distinguished from the whole,—but expended the money, so far as collected, upon the general improvement, leaving the whole incomplete? We think not. Under such circumstances the mere stopping of work because the money had been expended would not confer upon lot owners the right to recover the money paid. So far as appears from the complaint, this money may have been used in the undertaking, and, whatever remedy plaintiffs might have, there is no relief upon the ground of a failure of consideration.

While the questions already discussed dispose of this case, another claim of defendant is presented for decision with a view to a possible amendment of the complaint. It is this: That the plaintiffs cannot recover in any event, because they are not the parties in interest, and have suffered no injury. This assertion is based upon the fact of the sale of the premises in question by the city to Heyderstaedt. Appellant contends that, because plaintiffs suffered the premises to go to a sale, and did not redeem, they have not paid any money on the assessment, and that, whoever else may recover, plaintiffs cannot. We do not so hold. The law provides that the amount of the judgment shall be a first lien upon the premises.



The plaintiffs may pay the money, or permit their property to stand subject to the lien, or be absorbed in payment of it. In either case they pay the amount. And the purchaser at the sale does not succeed to their rights. We need not here decide what the rights of a purchaser would be. The question is not directly involved. But we assume that in no event could a purchaser recover his money except upon the same state of facts as would give lot owners the right, and the city is not called upon to pay the money twice. Under such conditions it is possible that a purchaser might recover as for a failure in part of the consideration, growing out of the implied contract on part of the city to complete the work, and expend the money, presumably for the benefit of the premises. Whatever be the legal remedy of the purchaser, if any, he has not succeeded to plaintiffs' claim, and the positions of the two are not inconsistent.

It is suggested that plaintiffs must redeem before they can maintain this action. In case of redemption the money would go to Heyderstaedt, and the city would act only as the agent to pay it over, and the only effect such action would have upon plaintiffs would be to change the nature of the payment by substituting the money in place of the lot. In either case the city would receive the money, and the plaintiffs pay it.

The order is reversed.

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FREDERICK E. KREATZ v. ST. CLOUD SCHOOL DISTRICT.

January 24, 1900.

Nos. 11,930—(194).

**Municipal Corporation—Building Committee—Repair of Heating Plant.**

In an action to recover from defendant school district the value of repairing a heating plant injured by the action of frost, the question of the authority of defendant's officers and agents and its liability considered. *Held* (1) that the court erred in granting defendant's motion for judgment notwithstanding the verdict; (2) that, the defendant having moved for a new trial in case the motion for judgment be not granted, the judgment be reversed, with leave to defendant to apply for a new trial.

79	14
80	73
181	214

79	14
81	8
81	183

79	14
82	516

79	14
84	316
84	402

Action in the district court for Stearns county to recover \$311.54 for labor and materials furnished. The case was tried before Searle, J., and a jury, which rendered a verdict in favor of plaintiff for the amount demanded. Thereafter the court made an order granting defendant's motion for judgment in its favor notwithstanding the verdict; and from a judgment entered pursuant to such order, plaintiff appealed. Reversed.

*Taylor & Jenks*, for appellant.

*George W. Stewart*, for respondent.

LEWIS, J.

The complaint in this action alleges that plaintiff furnished, at defendant's request, certain labor and material for the repairing of a certain steam plant in one of defendant's school buildings, which labor and material were of the reasonable value of \$311.54. The answer denies that the labor and material were furnished at defendant's request, and admits that said school building was owned by defendant, but denies that it was controlled by it during said time, but states that the building was controlled by, and occupied by, one Heimann, who was then, under a contract from defendant, engaged in erecting the same; that the plaintiff had previously entered into a contract with defendant whereby plaintiff agreed to furnish for defendant a complete system of steam heating for said building, according to certain plans and specifications; and that said contract was not completed by plaintiff until after the time said labor and materials were furnished, and that the same were furnished by plaintiff in pursuance of, and in completion of, his said contract. To this answer plaintiff replied, denying all allegations of new matter, and alleging that said contract for furnishing the heating system had been completed when said labor and materials were furnished for repairing, and that the same were in no way connected with said contract.

At the close of the testimony, defendant moved the court to direct a verdict for the defendant upon the ground that plaintiff had failed to make out a cause of action. The motion was denied. The cause was submitted to the jury, and a verdict was returned for plaintiff. Thereupon defendant moved the court for judgment in favor of defendant notwithstanding the verdict, or, if that motion

be denied, that it would move for a new trial. This motion was granted, and judgment was ordered in favor of defendant against the plaintiff for the costs and disbursements of the action. Judgment was entered, and plaintiff appeals.

It appears from the charge to the jury that the court submitted the cause upon one question only, viz. whether or not the plaintiff's contract for putting in the heating plant had been completed and accepted by defendant at the time of the accident; if the plant had been accepted, the plaintiff should recover. On the contrary, if the plant had not been accepted by defendant, then plaintiff could not recover, because, under his contract with defendant, the plaintiff assumed all risks of loss resulting from accident until acceptance of the plant by defendant. •

While the evidence is somewhat conflicting and indefinite, the responsibility of the accident does not rest alone upon the question of technical acceptance of the heating plant by defendant. The plaintiff must show that the accident did not occur by reason of his own negligence, even if defendant were in control of the plant at the time of the accident, and if plaintiff were still in control of the plant he cannot recover if the accident were occasioned by the negligence of the janitor. The defendant cannot be held liable unless it had assumed control of the plant at the time of the accident. If the defendant assumed control of the plant, and permitted its agents to run it, and the accident occurred by reason of the negligence of such agents, the defendant cannot escape liability because it had not formally and technically accepted the plant.

The plaintiff testified that on Monday, November 28, he called up by telephone the chairman of the building committee; that he (the plaintiff) had been running the plant several days for the benefit of the school board; that he at that time informed the chairman that, unless they put a man in charge of the plant, he would draw the water off; that he had run it as long as he cared to for the benefit of the school board; that the chairman replied that he did not care what he did with it, but that he had better see Mr. Parr before he drew it out. Plaintiff further testified that he saw Parr, but he was not permitted to state what took place between them. Parr testified that he was superintendent of schools of St. Cloud, and that, under resolution of the board, he had supervision and

direction of the janitors employed by the board; that he gave directions to janitors; denies that he gave any directions to the janitor Lacher to take charge of the new heating plant, but admits a conversation with plaintiff as follows:

"I met Mr. Kreatz [on Monday, November 28] \* \* \* and he made the statement to me that he was about to draw the water out, or take the fire out, and let the plant get cold. I said I hoped that would not be done; that it would be necessary for me to see certain parties before an arrangement could be made to continue the water and fire, and I would see about it."

The record shows that there was a man in the employ of the board named Tenny whose business was to superintend construction of the building under the contractor Heimann. This man Tenny directed Heimann to secure the janitor Lacher to operate the plant. The plaintiff took away his men on Monday, and Lacher took charge, and it was while the plant was being operated by him that the accident occurred, on the night of the 30th. It also appears that the plant was completed on the 28th, with the exception of placing a few pieces of board under some of the radiators. It also appears that the building committee held a meeting immediately after the accident, and agreed that the repairing must be done, as it was getting late, and directed the chairman to see that it was done; that this committee was a special building committee, and had charge of the construction of the new buildings. The secretary of the committee, a member of the board, testified that the members of the board all knew about the repairing by plaintiff. There was no acceptance of the plant by resolution of the committee or the board at any time, except as appears from the records of the board as follows, under date of February 28, 1899:

"The bill of Fred. E. Kreatz for expenses incurred in replacing radiators broken by freeze \* \* \* was read, and on motion of Geo. W. Stewart, chairman of the special committee on buildings, that so much of the bill as relates to the freeze \* \* \* be rejected."

On this evidence, we are asked by respondent to sustain the judgment principally upon two grounds: First, even if the accident occurred from no fault of plaintiff, and defendant was in control of the plant, the defendant had no authority to order the repairs;

second, if the defendant did have such authority, then it conclusively appears from the evidence that the accident occurred while the plant was in charge of plaintiff, and under his contract with defendant he was responsible, and must stand the expense.

The authorities cited by counsel are not applicable. In *Newbery v. Fox*, 37 Minn. 141, 33 N. W. 333, is found this language:

"The doctrine of ultra vires has, with good reason, been applied with greater strictness to municipal bodies than to private corporations, and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract."

But in that case the doctrine of estoppel was not applicable. The contract had been entered into without authority, but the plaintiff had proceeded with his work notwithstanding he had been warned that his contract was void. In the case of *Young v. Board of Education*, 54 Minn. 385, 55 N. W. 1112, a school-district treasurer, without authority, had borrowed \$205, to complete the building of a school house, the amount of money raised for that purpose being insufficient in that amount. In an action to recover the amount from the district, it was held that no estoppel or ratification could be inferred from the fact that it retained and enjoyed the benefit of the expenditure, because it was inseparable from its property, the district having no option to reject the improvement caused by so much money being used in the payment of labor and material. Neither is this case within the rule of ultra vires, as applied in *Bazille v. Board of County Commrs.*, 71 Minn. 198, 73 N. W. 845; nor is the law applicable as applied in the case of *Leland v. School District*, 77 Minn. 469, 80 N. W. 354. In that class of cases the statute in express terms defines what shall constitute a contract, and it cannot be varied, and there is no possible application of the doctrine of estoppel. But, in the case we are considering, granted that the chairman and the committee had no authority to order the repairing, yet if it was done at their request and with knowledge on the part of the committee and members of the board, and the work was of such notable character, and continued for such length of time, and under such circumstances, as to raise the presumption that it was with the common consent of the district, then there

would arise an obligation to pay for it. *Andrews v. School District*, 37 Minn. 96, 33 N. W. 217.

Second. As before remarked, the evidence as to who was responsible for the injury is indefinite and conflicting, and, for our present purpose, it may be conceded that upon the evidence the court would have been justified in granting defendant a new trial. But under the rule established in *Cruikshank v. St. Paul F. & M. Ins. Co.*, 75 Minn. 266, 77 N. W. 958, followed in *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617, judgment notwithstanding the verdict should only be granted when it is clear that the cause of action or defense put upon the record did not, in point of substance, constitute a legal cause of action or defense. In this case, the evidence lacking to fix the responsibility upon the defendant may be supplied by a new trial. If the building committee in fact set into operation the action of its agents, which resulted in the janitor taking possession of the plant and causing the injury, the defendant could not compel plaintiff to repair under his former contract. The provisions in that agreement, as to taking the risk of accidents, and completing the plant to the satisfaction of the architect, do not apply to acts performed or caused by defendant. The building committee had express authority to cause the construction of the building and the heating plant. It was the only representative of the board, and its chairman its representative. Action by that committee, or its active members, in taking possession of the plant and so causing the injury, would bind the defendant, at least to the extent of removing the responsibility from the plaintiff. Such action would require no ratification by defendant. It was within the limits of their general powers of construction and supervision.

The defendant having moved for a new trial in case the motion for judgment be not granted, it is ordered that the judgment be reversed, with leave to defendant to apply to the court below for a new trial.

COLLINS, J.

I concur in the conclusion, upon the ground that, under the rule laid down in *Cruikshank v. St. Paul F. & M. Ins. Co.*, 75 Minn. 266, 77 N. W. 958, the court below should have granted a new trial,

instead of ordering judgment for defendant notwithstanding the verdict.

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FRANK H. GAHRE v. HELEN G. BERRY.

January 26, 1900.

Nos. 11,852—(196).

**Second Trial in Ejectment.**

G. S. 1894, § 5845, providing for a second trial as a matter of right in actions for the recovery of real property, is a remedial statute, and must be liberally construed. To determine the right to such second trial, the court will look to the substance of the cause of action determined, and not merely to the form or manner in which it is presented.

**Trial Court Reversed.**

Rule applied, and *held*, that the trial court erred in setting aside the defendant's demand for a second trial.

Appeal by defendant from an order of the district court for Hennepin county, Brooks, J., setting aside a demand for a second trial. Reversed.

*Chas. G. Laybourn*, for appellant.

*M. H. Boutelle* and *N. H. Chase*, for respondent.

**PER CURIAM.**

The sole question here involved is whether the defendant was entitled as a matter of right to a second trial of this action, pursuant to G. S. 1894, § 5845, providing for a second trial in an action for the recovery of real property.

The complaint alleged that the plaintiff was the owner in fee and in possession of certain land, describing it, and that the defendant claimed some estate or interest therein adverse to plaintiff, but that she had no title to or interest therein, whatever. The relief prayed for, so far as here material, was that it be adjudged that the plaintiff was the owner of the land, and entitled to the possession thereof, that the defendant had no title to or interest therein, and for general relief. The answer denied the allegations of the complaint, except as admitted, and affirmatively alleged that the de-

fendant was the owner in fee of the land and entitled to the possession thereof; that the plaintiff claimed some title or interest therein, but that he had no title to or interest therein whatever; and prayed, among other things, that the defendant be adjudged the owner in fee of the land and entitled to the possession thereof.

The trial court found that the plaintiff was the owner in fee and in the actual possession of the land; that the defendant had no title to or interest therein; and ordered judgment accordingly. It was so entered, and thereafter, and within six months, the defendant paid the costs, and duly demanded a second trial of the action. Thereupon the plaintiff moved the court to set aside the demand, and the defendant appealed from the order granting the motion.

The statute giving a second trial as a matter of right in actions for the recovery of real estate is a remedial one, to be liberally construed. The court, to determine the right to a second trial in any given case, will look to the substance of the action determined, and not to the form thereof, and if, in fact, it was an action in which either party sought to recover the possession of land, the right to a second trial must be conceded. *Eastman v. Linn*, 20 Minn. 387 (433); *Ferguson v. Kumler*, 25 Minn. 183; *Schmitt v. Schmitt*, 32 Minn. 130, 19 N. W. 649; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 49 Minn. 88, 51 N. W. 662.

The answer in this case contains all of the essential allegations of a cross action for the recovery of real property, except that it neither admits nor alleges that the plaintiff is in possession, but the complaint alleges that the plaintiff is in possession of the land, and asks the court to adjudge that he is entitled to such possession; while the answer alleges that the defendant is the owner of, and entitled to the possession of, the premises, and prays the judgment of the court accordingly. Now, does the mere fact that the defendant by a general denial raised an issue as to plaintiff's possession change the substantial character of the answer as a cross action for the recovery of land? It would seem not. If the trial court had found that the plaintiff was in possession of the land, but that the defendant was the owner in fee, and entitled to possession thereof, and judgment had been entered accordingly, the plaintiff would clearly have been entitled to a second trial under the statute; for the findings would, in such case, be responsive to the issues, and



the defendant on such a judgment would be entitled to an execution for the delivery to her of the possession of the land she was adjudged to be entitled to the possession of. If, in such case, the plaintiff is entitled to a second trial, it is because, and only because, the action as to the defendant is, in effect, one for the recovery of the possession of real property. We are of the opinion that the trial court erred in setting aside the defendant's demand for a second trial.

Order reversed.

START, C. J. (dissenting).

I dissent, for the reason that the action as to each party is one to determine the title to real property, and not to recover possession thereof.

CHARLES A. COOPER v. SAMUEL L. HAYWARD and Another.

January 28, 1900.

Nos. 11,931—(210).

**Promissory Note.**

This is an action on a promissory note. Defense, that the note had been satisfied, and the defendants released therefrom. *Held:*

**Verdict Sustained by Evidence.**

That the evidence was sufficient to sustain the verdict.

**Evidence of Admissions of Witness.**

That it was not prejudicial error, in view of the facts stated in the opinion, for the trial court to receive, before the proper foundation had been laid, evidence tending to show that a witness had made prior inconsistent statements.

**Refusal to Charge Jury.**

That a request to charge the jury was properly refused because not justified by the evidence.

Action in the district court for Stearns county by plaintiff as administrator of the estate of William H. Hayward, deceased, to recover \$515.80 and interest on a promissory note executed by defendants to the order of intestate. The case was tried before Baxter, J., and a jury, which rendered a verdict in favor of defendants. From an order denying a motion for a new trial, plaintiff appealed. Affirmed

*George W. Stewart*, for appellant.

*Taylor & Jenks*, for respondents.

START, C. J.

Action on a promissory note. Defense, that the note had been satisfied, and defendants released from further liability. Verdict for the defendants, and the plaintiff appealed from an order denying his motion for a new trial.

This is the third appeal in this action. See 67 Minn. 92, 69 N. W. 638, and 71 Minn. 374, 74 N. W. 152. The evidence on the last trial on the part of the defendants tended to show these facts: William

H. Hayward, a brother of the defendant Samuel L. Hayward, and his father, J. E. Hayward, were partners in the lumber business at the time the note in question was made, under the firm name of W. H. Hayward & Co. The defendant Samuel L. Hayward was then about to lose his stock, by reason of chattel mortgages thereon; and, not being on good terms with his father, he appealed to his mother for financial assistance. She, through her son William H. Hayward, caused the mortgages to be paid. William H. Hayward managed the firm affairs and handled the firm money, and also managed his father's individual affairs, and handled his father's individual money, and drew checks on his father's bank account, and signed his father's name to them, and was authorized so to do. By direction of his mother, and on the promise of his mother to shield him from his father's displeasure, he took the necessary money, belonging either to his father individually or to the firm, and paid the chattel mortgages. He took the note in controversy for the amount so paid, \$578.25, but without the knowledge of his mother, who intended it as a gift. He died January 10, 1890, and his widow, his only heir, made a settlement of his partnership business with his father, J. E. Hayward, the surviving partner, whereby she conveyed to him all the partnership property and everything pertaining thereto. The surviving partner, J. E. Hayward, died on March 13, 1895. His estate was duly probated, and all his personal property, except certain specific parcels, of which the note in question was not one, was duly assigned to his four daughters, who thereafter executed to defendants a full release, discharge, and satisfaction of the note. Only one claim was ever filed against the estate of William H. Hayward, which was for the sum of \$26, dated November, 1887, presented to the probate court for allowance September 14, 1895, and was not allowed as a claim against his estate. The evidence on the part of the plaintiff tended to show that William H. Hayward paid the chattel mortgages against the defendant with his own money.

1. The plaintiff claims that the verdict is not sustained by the evidence. The principal contention in support of this claim is substantially this: The evidence was conclusive that the money which formed the consideration of the note belonged to either William H.

Hayward or to the firm. But, if it be conceded that the money was that of the firm, still the transfer by his sole heir of all the interest which William H. Hayward had in the assets of the firm at the time of his death was void, as against his administrator, because there was then a claim of \$26 against his estate. The short answer to this is that there was no evidence that there ever were any valid claims against the estate, but, on the contrary, the evidence is sufficient to sustain a finding that there were none. The evidence is to the effect that a claim of \$26 was filed against the estate and disallowed. The mere fact that a claim was filed (that is, asserted) against the estate, and not allowed, is not proof that there was in fact a debt against the estate. Conceding, without so deciding, that the burden was on the defendants to prove that there were no debts against the estate, the fact that none were allowed, and that the time for the presentation and allowance of claims against the estate had passed, was *prima facie* proof, at least, that there were none. We are not to be understood as holding that the transfer would have been void if there had been debts against the estate. It would in that case have been valid, but the transferee would have taken his title subject to the right of the administrator to subject the interest of the deceased in the firm assets to the payment of the debts against his estate. The evidence was ample to support the verdict.

2. The plaintiff assigns twelve alleged errors in the rulings of the trial court as to the admission of evidence. As to most of these rulings, the only objection to them which is or can be made rests upon the proposition that the transfer in question by the widow and heir was void because there was a debt against the estate. The evidence, as we have shown, was sufficient to sustain a finding that the transfer was valid, and the title of the transferee absolute. Hence the evidence was properly received. Such evidence was not received to vary the terms of the note, but to show to whom it actually belonged.

The other rulings of the court on the admission of evidence assigned as error have been considered, and found to be correct, with one exception. The wife of the plaintiff, the heir of William H. Hayward, was a witness in his behalf, and gave testimony tending

to show that the money with which the defendants' debts were paid, and for which the note was given, was the money of her deceased husband, William H. Hayward. The defendants then called Mrs. Freeman as a witness, who testified (the plaintiff objecting that the proper foundation therefor had not been laid) to an admission by plaintiff's witness (stating the time and place approximately) to the effect that the money belonged to the father. Thereupon the plaintiff recalled his witness, who testified that she had just heard the testimony of Mrs. Freeman, and denied that she ever made the admission.

It is a fact that when the admission was given in evidence the proper foundation had not been laid by first calling the witness' attention to the time and place of making the alleged admission. The basis of the rule requiring such foundation to be laid before prior inconsistent statements or admissions can be given in evidence is justice to the witness, which requires that he be given an opportunity to recall the facts, by calling his attention to details as to when and where, and to whom, the alleged statements were made. Hence the ruling of the trial court was error when made; but was it reversible error (that is, prejudicial error), in view of the fact that the time, place, and details of the alleged admission were stated in the hearing of the witness, who thereafter voluntarily and unqualifiedly denied that she ever made the admission? We are of the opinion that it was not, for the witness was given an opportunity to recall the facts as to the alleged admission after her recollection had been refreshed by hearing the alleged details as to the conversation in which it was claimed the admission was made. The reason of the rule was satisfied in an irregular manner. But the order in which the evidence was received could harm no one.

3. The plaintiff requested the court to instruct the jury that if they found that William H. Hayward furnished any part of the money, less than the whole thereof, for which the note was given, they could find a verdict for the plaintiff for the amount which they found was so furnished. The trial court properly refused to give this request, for there was no evidence to justify the giving of it. If William H. Hayward furnished any of the money, he furnished the whole of it; and the jury were instructed that, if such were the

case, the plaintiff was entitled to a verdict. The alleged error of the trial court's instruction as to the release by the widow of her interest in the firm assets we do not consider, because plaintiff did not except to the instruction.

Order affirmed.

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STATE ex rel. JOHN ZASKE v. DISTRICT COURT OF BROWN COUNTY.

January 26, 1900.

Nos. 11,981—(224).

**Writ of Certiorari.**

Except in special and extraordinary cases, certiorari will not lie where there is or has been an opportunity for an appeal.

**Inability to Give Appeal Bond.**

Mere inability to give an appeal bond does not make a case exceptional within the rule.

**G. S. 1894, § 2046—Bastardy—Application for Discharge.**

An order, made pursuant to the provisions of G. S. 1894, § 2046, relating to bastardy proceedings, denying the defendant's application for his discharge from custody, is appealable.

Writ of certiorari issued out of the supreme court to review an order of the district court for Brown county, Webber, J., in bastardy proceedings. Writ quashed.

*Jos. A. Eckstein* and *A. Frederickson*, for relator.

*Geo. T. Olsen*, County Attorney, and *Somerville & Olsen*, for respondent.

**PER CURIAM.**

The facts in this case are stated in the opinion in the case of *State v. Matter*, 78 Minn. 377, 81 N. W. 9, in which it was held that the relator could not review the order of the district court complained of on habeas corpus. Thereupon he sued out the writ of certiorari in this case. On the return of the writ the respondent moved to quash it, for the reason that the order was appealable, and therefore certiorari would not lie to review it.

The uniform doctrine of this court is that the writ of certiorari will not lie, except in special and extraordinary cases, where there is or has been an opportunity for appeal. Mere inability to give the appeal bond does not, as claimed by the relator, bring the case within the exception. It has been held otherwise in some jurisdictions, but we cannot so hold. If a party were permitted to review an order or judgment, after the time for appeal had expired, by certiorari, because he was unable to give the bond, it would lead to embarrassment and injustice in practice. If there is to be a change in the statute, dispensing with an appeal bond in cases where parties seeking to review their case are unable to give it, the change must be made by the legislature.

The relator was committed to jail for failing to comply with the terms of a judgment in bastardy proceedings against him, and, after having been imprisoned for ninety days, he petitioned for his discharge, under the provisions of G. S. 1894, § 2046. The district court, on November 3, 1899, made its order denying his petition conditionally, and remanded him to jail until he complied with the condition. This is the order which the relator here seeks to review. If it is appealable, the writ must be quashed. We hold that the order is a final one, affecting a substantial right, upon a summary application in an action after judgment, and therefore it is appealable. G. S. 1894, § 6140, subd. 6.

Writ quashed.

## GERMANIA BANK v. CITY OF ST. PAUL

January 31, 1900.

Nos. 11,813—(171).

79	29
86	100

**Assessment for Local Improvement—Recovery by Lot Owner.**

The owner of municipal property, upon which valid assessments have been made for the purpose of a general scheme of improvement, as the laying out and grading of streets, may, in case of a failure on the part of the city to finish its work and an abandonment of the same, recover his share pro tanto of the sum so unexpended, in an action for money had and received. *McConville v. City of St. Paul*, 75 Minn. 383, followed.

**Same—By Purchaser of Certificate of Sale.**

Whether the purchaser of the tax certificates at a tax sale stands in the same position as the lot owner, so far as his right of recovery is concerned, *quære*.

**Complaint Defective upon Demurrer.**

But such purchaser cannot recover in this case, for the reason that it does not appear that the money paid for the improvement by such certificate holder has not all been legally and honestly expended in the general scheme of the improvement, even though the particular lot on which the tax was imposed was not benefited by its expenditure.

Action in the district court for Ramsey county to recover \$5,270.  
44 with interest, the amount of certificates of sale of real estate sold pursuant to judgment entered in the matter of a special assessment levied by defendant city. From an order, Kelly, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

*O. E. Holman*, for appellant.

The purchase at the tax sale is a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. *Cooley*, Taxn. (2d Ed.) 545; *Fleming v. Roverud*, 30 Minn. 273, 275. The legislative enactments and the various proceedings taken by defendant up to the sale and assignment of the certificates to plaintiff created certain implied obligations and promises on which the purchaser or the assignee of the certificates had the right to rely and which defendant was in good faith required to carry out. The purchaser had the right to expect that the improvement would be com-



pleted as contemplated and that the property would be benefited to the extent of the assessment levied. When the city abandoned the improvement and failed to give this property any benefit whatever, the consideration for the assignment of the certificates of sale to the plaintiff wholly failed. *Bradford v. City of Chicago*, 25 Ill. 411; *Valentine v. City of St. Paul*, 34 Minn. 446, 448; *Falls v. City of Cairo*, 58 Ill. 403; *McConville v. City of St. Paul*, 75 Minn. 383; *Brand v. Williams*, 29 Minn. 238, 239; *Strickland v. City of Stillwater*, 63 Minn. 43, 44; *Pimental v. City of San Francisco*, 21 Cal. 352, 362; *City of San Antonio v. Peters* (Tex. Civ. App.) 40 S. W. 827; *Lawton v. Howe*, 14 Wis. (241) 261; *Reilly v. City of Albany*, 112 N. Y. 30, 42; *Colville v. Besly*, 2 Denio, 139, 142; *Clafin v. Godfrey*, 21 Pick. 9; *Louisiana v. Wood*, 102 U. S. 294; *Dillon, Mun. Corp.* § 460.

The purchaser of the certificates at the expiration of the time of redemption was entitled to a deed conveying to it the premises sold and unredeemed. The city was impliedly bound not to take any steps or do any act after the sale and assignment of the certificates which would interfere with the purchaser's right to the conveyance of the property sold. When the city abandoned the improvement, the property owner became entitled to a decree of court freeing his property from the cloud of the assessment proceedings, judgment, and certificates of sale, upon the grounds that as to him the consideration for the assignment, judgment, and sale had wholly failed. *Roberts v. First Nat. Bank*, 79 N. W. 1049; *Chapman v. City of Brooklyn*, 40 N. Y. 372, 381. An examination of the records, however, could not have disclosed any intention on the part of the defendant to abandon the improvement. Ever since the abandonment the property owners had the right to the removal of the cloud placed upon their property by the assessment proceedings, judgment, and certificates of sale. *Valentine v. City of St. Paul*, *supra*. The property owners had 15 years after expiration of the time of redemption to bring action to remove the cloud of the judgment and sales. *State v. Norton*, 59 Minn. 424. *Flanagan v. City of St. Paul*, 65 Minn. 347, is not applicable. See *Merchants R. Co. v. City of St. Paul*, 77 Minn. 343.

Assuming that the rule caveat emptor has been adopted by this

court, it cannot be applied to the facts of this case. *Cooley*, Taxn. (2d Ed.) 475; *Merriam v. County of Otoe*, 15 Neb. 408; *Budge v. City of Grand Forks*, 1 N. D. 309; *Pennock v. Douglas*, 39 Neb. 293.

*James E. Markham* and *Franklin H. Griggs*, for respondent.

Plaintiff is in the position of a mere volunteer to whom the rule of caveat emptor applies. *Black*, Tax Titles, § 463; *Cooley*, Taxn. (2d Ed.) 476, 546; 2 *Desty*, Taxn. 850; *Pennock v. Douglas*, 39 Neb. 293; *Lynde v. Inhabitants of Melrose*, 10 Allen, 49; *Merriam v. County of Otoe*, 15 Neb. 409; *Budge v. City of Grand Forks*, 1 N. D. 309; *Hargous v. Stone*, 5 N. Y. 73, 80; *Wright v. Hart*, 18 Wend. 449, 452; 2 *Blackstone*, Com. 451; 2 *Kent*, Com. 479.

Whether the rule of caveat emptor applies or not, plaintiff is in no position to recover so long as the validity of the certificate held by it remains unquestioned. If plaintiff can recover at all, it must be under the provision for refundment contained in the municipal code which authorized the issuance of the certificates. If plaintiff is ever entitled to recover the amount paid by it for its certificates, it will be because Sp. Laws 1887, c. 7, subc. 7, tit. 1, § 50, as amended by Sp. Laws 1889, c. 32, aids it to recover, and only in the event that the certificates it holds shall be set aside. *Flanagan v. City of St. Paul*, 65 Minn. 347; *Merchants R. Co. v. City of St. Paul*, 77 Minn. 343. Even if the provisions of the charter authorizing the refundment are inapplicable, the plaintiff cannot recover until its certificates have been shown to be worthless. *State v. Olson*, 58 Minn. 1.

If plaintiff has sustained any injury, equity will not come to its assistance, because it has neither appealed to it in time, nor is it willing to do equity. Whatever injury plaintiff may have sustained, it has lost its remedy by laches. Plaintiff will not be granted a rescission of the contract and the return of the consideration paid, except upon the condition that the certificates shall be returned to the city

LOVELY, J.

This action was brought to recover \$5,000 and upwards, the amount of several certificates of sale of real estate sold pursuant to tax judgments of the district court of Ramsey county. The lands

in question were bid in by the respondent, and the certificates issued thereon assigned to the Germania Bank, upon an assessment legally made for the opening, widening, etc., of East Third street, in the city of St. Paul, from White Bear avenue to the east city limits.

The complaint, upon the sufficiency of which this contention arises, sets out fully all the steps taken in carrying out the improvement, and shows that the proceedings were valid and regular to acquire title by tax sale of the lots described in the complaint, which were subject to assessment and sale therefor; also that certificates were duly issued to the city on the sale of such lands, and afterwards were assigned by the city to appellant, which now in this suit seeks to recover the amount paid for such certificates, with interest thereon. The complaint further alleges that the city had acquired full right to make the improvement throughout its whole extent; that it had contracted for the completion of the same, but, before it had in fact completed the enterprise, it ceased its work, and wholly abandoned the projected improvement; and that the lands described in the certificates (except a few lots in another subdivision) are left inaccessible, and that none of the lots are practically benefited by what had been done. It is further claimed that plaintiff bought the certificates in good faith, believing that the city would complete the entire improvement; that, by reason of the facts above set forth, the consideration for the certificates has wholly failed; that the bank, in equity and good conscience, ought to have the money paid by it for the same returned, and therefore brings this suit.

To the complaint the city interposed a demurrer, challenging its sufficiency to state a cause of action; which demurrer was sustained by the learned court below, principally upon the ground that, the city charter of St. Paul having provided "that in any action heretofore or hereafter commenced in which the validity of a deed \* \* \* is brought into question, and, on account of any irregularities, the same shall be set aside," the lienholder may recover the amount paid, with interest (Sp. Laws 1887, c. 7, subc. 7, tit. 1, § 50, as amended by Sp. Laws 1889, c. 32), and that under the authority of *Flanagan v. City of St. Paul*, 65 Minn. 347, 68 N. W. 47, the remedy by the

lienholder was limited only to cases where the lien had been first set aside. The trial court also held that under the rule of caveat emptor, which was applied to this transaction, the purchaser assumed all risks, and took the certificates without warranty of any kind.

The order sustaining the demurrer is now brought by appeal into this court, and the question which we have to dispose of is whether the complaint states a cause of action, and whether the assignee of the city can, upon the facts above set forth, recover back his money.

It is not claimed by appellant that it could have its certificates cancelled for irregularities under the law referred to; for there were no irregularities from assessment to sale, all proceedings were duly and legally conducted, and counsel for appellant conceded on the argument that such statute could not be open as a remedy to the bank in any event. We concur in this view, and, if the statute referred to is to be looked to for the only remedy, it surely affords none, for the manifest reason that the tax proceedings have not and could not be set aside for irregularities. Neither do we think that the doctrine of caveat emptor applies to the assignee, since, for the same reason, there were no defects in the proceedings preliminary to the tax judgment and sale, and no question of title is in dispute.

Appellant goes further in its claims than the remedy in the charter, and contends that when it paid its money to the city for a local improvement which was to benefit the property upon which it was to be expended, and likewise under the assurance that it would be so expended, the city could not abandon this work without paying back the money to the source from which it was obtained, which would, in effect, operate to cancel the certificates. Much force is given to this contention by the recent decision of this court in *McConville v. City of St. Paul*, 75 Minn. 383, 77 N. W. 993, following and affirming *Valentine v. Same*, 34 Minn. 446, 26 N. W. 457, and *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131. These cases have been fully considered, and their effect clearly pointed out, in the opinion of Justice Lewis in the case of *Rogers v. City of St. Paul*, *supra*, page 5, presented and considered at the same time with this case, and it is not necessary to review them here further than to say that the result of these cases is to the effect

that lot owners who have paid money into the city treasury on valid assessment for local improvements, where the city does not make the improvements, but totally abandons the work, and retains the money, can recover back the same, or so much thereof as it retains. We affirm this principle. It rests upon the highest equitable grounds, and the reasons for it have been so fully considered in the cases referred to that we need take no further time to express our views in that respect.

If this appellant were the owner whose land had been sold, and it appeared that the money the city had received was wholly or partly unexpended, and that the city declined to perform any further work upon the improvement, its right of recovery of the same, or its share pro tanto, would, in our view, be unassailable. But the assignee of the certificates—the Germania Bank, in this case—is not the lot owner, as in cases referred to, and whether its relation to the property covered by the tax lien is such as to identify it with the work of improvement sufficiently to give it an interest in the expenditure for the improvement, and a cause of action for the abandonment of the work, when the money it has contributed is still unexpended, is a question upon which we do not pass at this time, since we are clear that the order of the court below should be affirmed upon grounds that are in harmony with the theory of *McConville v. City of St. Paul*, *supra*, and the previous cases considered therein.

It appears from the complaint in this case that before the entire work was completed, according to the general plan of the improvement, it was abandoned by the city, and that the lot upon which the certificates were placed received no benefit from such work. But this entire improvement must be considered, with reference to this view, as a unit, and, for all that does appear in the complaint, the money realized from the sale to the Germania Bank might have been honestly expended in furtherance of the enterprise for which it was received. If such were the case, it is not clear to us how either the lot owner or the assignee of the certificates could recover in an action for money had and received as for a failure of consideration, or upon any other equitable ground, unless it be held that, in all works of local improvement, the city not only guaranties that the money it collects upon assessment and levy shall be honestly ex-

pended, but also that it will accomplish the ultimate purposes for which it was collected. To permit an action to lie to recover money that had been legitimately expended in public work, because the work was not accomplished according to the estimates or calculations of the municipal trustee, would be an unheard of proceeding, without an authority to support it, opposed to the rule in *Strickland v. City of Stillwater*, *supra*, and does not commend itself to our views of right and equity.

The complaint falls short of excluding the claim that the public officers of the city who handled the money of appellant failed to expend it for the general purposes for which it was received, or that the city has retained it or used it for other purposes, which, under our view, would constitute an essential and necessary prerequisite to a recovery, and upon that ground we think the order of the district court sustaining the demurrer in this case should be affirmed.

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JEFFREY SPENCER v. PLANO MANUFACTURING COMPANY.

January 31, 1900.

Nos. 11,909—(198).

**Loss of Collateral Note—Action for Value—Insolvency of Makers.**

In an action to recover the value of a pledged note from the pledgee, who has lost the same, upon the sole ground that the makers of such lost note were insolvent within specified times when it might have been collected, *held*, that judgment should have been ordered for the pledgee, for the reason that the insolvency of the makers of the lost note was shown at the material times, beyond any question.

Action in the district court for Big Stone county to recover \$404.21 damages, being the amount of principal and interest of a promissory note pledged with defendant, which it had failed to return after payment of the indebtedness secured. The case was tried before C. L. Brown, J., and a jury, which rendered a verdict in favor of plaintiff for \$385.17. From an order denying a motion for judgment in its favor notwithstanding the verdict, but granting

a new trial, defendant appealed. Reversed, and remanded with directions to enter judgment in favor of defendant.

*Fred. W. Reed*, for appellant

*Ray G. Farrington*, for respondent.

LOVELY, J.<sup>1</sup>

Jeffrey Spencer gave a note to the Plano Manufacturing Company for \$61.18, due October 1, 1894, and afterwards delivered to the payee of such note, as collateral security for the payment of his own debt, another note, of \$273, running to himself, and made by one Brunell and wife, which latter note became due on October 1 of the same year. On September 27, 1895, Spencer paid his note to the Plano Company, and demanded from it the return of the Brunell note which was then overdue. The collateral note was not, however, returned to Spencer, for the reason, as subsequently appears, that it had been lost while in the hands of the pledgee, who has never returned it to the owner, and did not in fact notify him that it had been lost until after July 1, 1897, when the company disclaimed any interest in the same, in favor of Spencer. Spencer, after several ineffectual efforts to obtain possession of the Brunell note, brought suit against the Plano Company to recover the amount thereof, with interest, upon the sole ground, as alleged in his complaint, that between the time when he paid his own note and demanded the return of the Brunell note, and the time when he first learned that it had been lost,

"The makers of said note were solvent, and, if plaintiff [Spencer] had had possession of said [collateral] note, he could then have collected the same, but that now, and at all times since defendant [Plano Company] has claimed said note to be lost, the makers thereof [Brunell and wife] have been insolvent, and plaintiff unable to collect said note."

The solvency of Brunell and wife at the times stated above was denied by the answer, and upon the very limited issues thus made the cause was tried, and the jury returned a verdict for plaintiff for the full amount of the collateral note and interest.

The Plano Company made a motion under the statute (Laws 1895, c. 320) for judgment notwithstanding the verdict, and, failing in

<sup>1</sup> BROWN, J., having when district judge tried the case, took no part.

that, for a new trial. The trial court denied the motion for judgment, but ordered a new trial, and, in the order granting the same, held that, notwithstanding the insolvency of the makers of the collateral note at the time specified, such note might have had some value, which would be a question for the jury, and that "on the theory [upon which] the case was tried, that insolvency [of the Brunells] was a complete defense [as to the Plano Company], the verdict is not justified by the evidence," and that the insolvency of the makers of the note was "shown beyond any question."

We concur with the learned trial court in this statement of the issue and result of the evidence. The issue made by the pleadings and tried was the insolvency of the Brunells at the times specified in the complaint, when it is claimed their note could have been collected, and the evidence was directed only to such contention; and we also agree with the conclusion that the insolvency of the makers of the collateral note "was shown beyond any question." While it may be true that the present insolvency of the maker of a promissory note does not establish its worthlessness, and in a proper form of action, where the question of its intrinsic value becomes involved, it might, under suitable allegations, be proper to show such value, yet this rule does not apply in this suit, under the narrow issue proffered by plaintiff, and litigated at the trial by both parties. The only proof of value that could be inferred from any evidence in this case was to be drawn from the insolvency of the makers of the note between the times stated in the complaint, and upon this question the evidence shows that they were insolvent and also that no other trial of this case could legally change that result. When this conclusion is reached, it seems to us that judgment should have been ordered in favor of defendant. The justice of this course must be apparent when it is remembered that the respondent has owned the collateral note, with a subsisting cause of action thereon against the makers, ever since the disclaimer of the Plano Company, and that before such time he could have recovered nothing by suit upon it against Brunell and wife, by reason of the insolvency of such makers, which was "shown beyond any question."



Order for a new trial reversed, and case remanded, with direction to enter judgment for defendant below.

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GEORGE G. BROWN and Another v. T. F. LALLY.

January 31, 1900.

Nos. 11,927—(209).

**Agent to Sell Goods not Authorized to Receive Payment.**

A traveling salesman has not, as agent for his principal, in the absence of custom or usage, authority to collect for the goods previously sold by him. *Janney v. Boyd*, 30 Minn. 319, followed.

**Findings Sustained by Evidence.**

Evidence considered, and *held* to support the findings of the trial court.

Action in the municipal court of Minneapolis to recover \$134.75 and interest for goods sold and delivered. The case was tried before Kerr, J., who found in favor of plaintiffs for the amount demanded; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

*George H. Fletcher*, for appellant.

*John E. Tappan* and *Henry M. Farnam*, for respondents.

LOVELY, J.

This action was brought in the municipal court of the city of Minneapolis to recover for a bill of liquors. Defendant paid \$100 on account to plaintiffs' traveling salesman who sold him the goods, some time after the sale, and took a receipt therefor signed by such agent. The simple question on this appeal is whether that sum so paid to the salesman should be applied on the debt of the purchaser of the liquors. It has been held by this court that,

"Independent of controlling usage to the contrary, the sale of goods by an agent, or the fact that he is or acts as agent to take orders for goods, does not of itself authorize him to receive payment therefor." *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308.

This principle was recognized on the trial, and defendant attempted to prove a custom authorizing salesmen to collect such

debts previously due their principals. Some evidence was also offered by plaintiffs to show that notice had been, by letter and in statements on invoices, sent to the defendant that salesmen were not permitted to collect bills for goods sold. The trial court found for the plaintiffs generally, and there was evidence reasonably tending to establish such finding.

Therefore the order of the trial court overruling defendant's motion for a new trial is affirmed.

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EUGENE SCHULER and Another v. T. M. McCORD COMPANY.

February 1, 1900.

Nos. 11,847—(195).

79	89
881	872

#### **Lien under Foreign Statute—Foreclosure in Minnesota.**

Whether the holder of a statutory lien existing under the statutes of another state can, after the property covered thereby has been sold by the owner to a third person, and by him removed into this state, lawfully seize the property, and effect a foreclosure of his lien within this state, *quære*.

#### **Interpleader by Lienholder.**

Where, however, such owner brings an action in this state against such third person to recover the purchase price of such property, such lienholder may be interpleaded, under G. S. 1894, § 5273, or he may intervene in the action, and assert his rights as fixed by the laws of the state where the lien exists, as fully and to the same extent as though the action was pending therein.

Action in the district court for Hennepin county to recover a balance of \$125.10 due on a carload of wheat sold by defendant on account of plaintiffs. Defendant paid the amount demanded into court, and on its application L. B. Wood was substituted as defendant. From an order, Harrison, J., overruling plaintiffs' demurrer to the answer of defendant Wood, plaintiffs appealed. Affirmed.

*Alvord C. Egelston* and *A. S. Keyes*, for appellants.

Statutory liens are regulated by the laws of the forum, and can-

not be claimed by virtue of the laws of another state. 1 Jones, Liens, § 111; *Gause v. Bullard*, 16 La. An. 107. A statutory lien gives no vested right prior to its enforcement. Repeal of the statute, even after filing the claim of lien, annuls the lien. *Bailey v. Mason*, 4 Minn. 430 (546). Even could the lien be enforced in this state, the claimant must have seized the wheat, and foreclosed the lien as under a chattel mortgage. Seizure was the remedy given, and was exclusive. When a statute creates a right and provides a remedy, the statutory remedy is exclusive; and this although such remedy be impracticable or insufficient. *City of Faribault v. Misener*, 20 Minn. 347 (396); 23 Am. & Eng. Enc. 402; 1 Jones, Liens, § 776; *Flournoy v. Shelton*, 43 Ark. 168; *Love v. Cox*, 68 Ga. 269; *Fuller v. Kitchens*, 57 Ga. 265; *Griffin v. Chadbourne*, 32 Minn. 126. A party acquires no equitable rights by virtue of a statutory lien. His rights are strictly legal, and as prescribed by the statute. Unless he follows the remedy prescribed by the statute, he has no standing in court. 1 Jones, Liens, §§ 112, 776; *City of Faribault v. Misener*, *supra*; *Griffin v. Chadbourne*, *supra*.

Under the statute parties can be compelled to interplead. *Rohrer v. Turrill*, 4 Minn. 309 (407); *Cassidy v. First Nat. Bank*, 30 Minn. 86. Claimant confuses the bill of interpleader in equity, which may still be brought in this state, with the summary mode of interpleader by motion and order authorized by the statute. 3 Pomeroy, Eq. Jur. §§ 1324, 1329.

*Daniel Fish and Eugene N. Best, for respondent.*

The right of Shimek (or of his assignee) to be paid for his labor out of the proceeds of the wheat is, as between themselves, complete; and it could not be divested by any act of the employer or of anyone acting in his behalf. This is not a proceeding to foreclose the laborer's lien, nor are the rights of claimant to this money dependent upon his ability to pursue in this state the remedy given by the North Dakota statute. There is no necessity to foreclose the lien, because the plaintiffs have converted the wheat into money and the money is in court awaiting the direction of the court as to its proper disposal. The sole question in the case is, what disposition should be made of the fund, upon the admitted facts, as between the two claimants thereof? That question is to be answered

in the light of purely equitable principles, because the proceeding is peculiarly a proceeding in equity. The remedy of interpleader is exclusively an equitable remedy. Pomeroy, Eq. Jur. §§ 171, 1320, 1321. The summary method of interpleader introduced by statute simply changes the form, without in any way limiting or modifying the effect of the proceeding. 3 Pomeroy, Eq. Jur. § 1329. A court of equity having a fund in its hands and having also jurisdiction of the parties claiming it, is empowered to award it as equity and good conscience shall require. *Whitney v. Cowan*, 55 Miss. 626. The money is impressed with a trust arising from the wrongful conversion. 2 Pomeroy, Eq. Jur. § 1051; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75.

BROWN, J.

This is an appeal from an order of the district court of Hennepin county overruling plaintiffs' demurrer to the answer of defendant Wood.

The action was originally brought by the plaintiffs, who reside and are doing business at Wahpeton, North Dakota, against defendant T. M. McCord Company, a corporation doing business at Minneapolis, this state, to recover a balance due on a consignment to it by plaintiffs of a car of wheat. The defendant Wood made claim to the balance due for the wheat, and, to protect itself, the McCord Company paid the money into court, and asked to have Wood interplead as a defendant in the action. The application was granted. Wood appeared and answered, setting up and claiming title to the money under and by virtue of a laborer's lien acquired and perfected under the laws of the state of North Dakota, where the wheat was grown.

The answer set up that the wheat, the proceeds of which are in controversy, was raised and grown by one Ployhar on his farm in Richland county, North Dakota, during the season of 1897; that one Joseph Shimek entered the employ of said Ployhar in April, 1897, under a contract, and continued in his employ as a farm laborer from said April to November, 1897; that the work, labor, and services rendered by him were reasonably worth the sum of \$140, no part of which has ever been paid except the sum of \$24.90. It further alleges that on November 9, 1897, said Shimek, under and

pursuant to the laws of North Dakota, duly perfected a lien upon the crops of wheat so raised and grown by said Ployhar by filing an affidavit and notice of lien in the office of the register of deeds in and for said Richland county, as required by the terms of such laws; that on November 18, 1897, said Shimek duly sold and transferred said indebtedness and lien, for a valuable consideration, to the defendant, who now owns and holds the same. Judgment is demanded that the money in question be ordered paid to defendant Wood. The plaintiffs demurred to this answer, and appeal from the order overruling it.

The contention on the part of the appellants is that the lien relied upon by defendant, existing only by virtue of the laws of the state of North Dakota, has no extraterritorial operation, and cannot be enforced in this state; that the lien claimant in such a lien cannot, after the property covered thereby has been removed into this state, enforce his lien by a seizure and sale of the property within this state; that the lien can only be enforced within the state of North Dakota. Whether this contention is sound we need not consider. It is sustained by some of the authorities. *Donald v. Hewitt*, 33 Ala. 534; *Marsh's Admr. v. Elsworth*, 37 Ala. 85. The defendant Wood does not ask to foreclose the lien under which he seeks to obtain the fund now in court.

The property covered by his lien has been converted into money, and the money is in court awaiting its judgment and order as to the ownership thereof. Wood claims it under his lien. The money having been brought into court under the provisions of G. S. 1894, § 5273, it is entirely competent for the court to determine the rights of the rival claimants thereto. Whether an action could be maintained in this state, based upon a statutory lien existing under the laws of another state, for the conversion within this state of the property covered thereby, as in cases of chattel mortgages, we need not consider. Such is not this case. The proceeds of the property covered by this lien are within this state, in the hands of the court, and claimed by rival claimants. And we hold that in such a case the rights of the respective parties may be heard and determined, and the holder of a statutory lien existing under the statute of a foreign state may assert his rights to such fund under such lien.

In other words, whether the holder of such a lien can foreclose the same, or maintain an action for the conversion of the property covered thereby, within this state, or not, he may, when the proceeds of the property have been paid into court, assert his rights thereto under his lien; and if, in equity, his rights are superior to his rival claimant's, the fund will be awarded to him.

The only question necessary to consider at this time is as to which of these parties has the best right to this fund. We think the defendant Wood shows the best right. He shows a valid right under his lien, while the plaintiffs show no right at all. It is nowhere alleged in the complaint that plaintiffs have any right to the wheat or its proceeds, that they were ever the owners thereof, or ever possessed any interest therein. They merely alleged that they consigned the wheat to defendant McCord Company for sale for their account. This is insufficient to show that they were the owners of the wheat, or that they had any beneficial interest therein. *Benjamin v. Levy*, 39 Minn. 11, 38 N. W. 702. No doubt they could recover against the McCord Company, but they cannot recover against defendant Wood without showing some title or right superior to the lien. This they could do by a reply, if they in fact possess such superior right. Under the pleadings as they now stand, defendant Wood is entitled to judgment for the fund, and the demurrer to his answer was properly overruled.

Order affirmed.

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ROSCOE N. JACKSON v. MUTUAL BENEFIT LIFE INSURANCE  
COMPANY.

February 1, 1900.

Nos. 11,876—(190).

**Life Insurance—Principal and Agent—Notice.**

Notice to an agent, to constitute constructive or implied notice to the principal, must be of facts within the scope of the agency, or of or concerning business engaged in by the agent by the authority of the principal.

**Course of Dealing by Agent—Notice to Principal.**

A principal cannot be held to have permitted or acquiesced in a course of dealing on the part of his agent beyond his authority, unless he had notice of such course of dealing, or the circumstances surrounding it were such as to make it the duty of the principal to inquire.

**Declarations of Agent—Hearsay.**

Declarations and statements of an agent, not made in the course of his agency, but of and concerning past transactions in the principal's business, are hearsay and incompetent.

Action in the district court for Rice county to recover \$875.28 and interest for breach of contract, being the amount of two promissory notes alleged to have been given by plaintiff to defendant in payment of an insurance premium on policies which were not delivered. The case was tried before Buckham, J., and a jury, which rendered a verdict in favor of plaintiff for \$923.60; and from an order denying a motion for a new trial, defendant appealed. **Reversed.**

*Wilson & Van Derlip*, for appellant.

*Anson L. Keyes*, for respondent.

**BROWN, J.**

This is an action to recover the amount paid by plaintiff upon two promissory notes by him given to an agent of defendant in alleged payment of the premium on two life insurance policies, which policies were never delivered to him, but which notes were transferred by the agent to an innocent purchaser, to whom plaintiff so paid them. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial.

Although the evidence may be a little conflicting with respect to one or two matters, there is no serious controversy about the main facts. One Little was in December, 1894, and for some years prior thereto, engaged in soliciting applications for life insurance in defendant company. He was appointed such agent by, and reported to, a state agent of defendant, whose headquarters were at Minneapolis. He was first appointed by one Shepherd, and again by one Joyce, who succeeded Shepherd as defendant's state agent in September, 1894. In December, 1894, he procured from plaintiff an application for two policies in said company, of \$5,000 each; and, at the time of making and signing the same, plaintiff made and

delivered to the agent his two promissory notes, for \$395 each, in payment, as plaintiff alleges, of the first annual premium on the policies. At the same time said Little signed and delivered to plaintiff a receipt in the following words and figures, to wit:

“The Mutual Benefit Life Insurance Company.

752 Broad Street, Newark, N. J.

Received Dec. 6, 1894, from Dr. R. N. Jackson, \$790.00, being the first annual premium on \$10,000, at age 38, which entitles the said R. N. Jackson to a policy, in accordance with the application, for the said sum of \$10,000, provided the application of the said R. N. Jackson is accepted by the company, in which case this receipt will be binding on the company from the date of the medical examination. If declined, the premium will be returnable on surrender of this receipt. Frank E. Little, Agent.” Indorsed on side: “Payments for premiums are valid only when made to a duly-authorized agent of the company in compliance with its rules.

Amzi Dodd, President.”

The applications were forwarded to the company, and the policies were issued thereon, and returned to Little for delivery to plaintiff. Little never delivered them, or even called plaintiff's attention to the fact that he had them in his possession. Upon being called upon by the state agent, Joyce, to report thereon, he returned the policies to Joyce, with the statement that he could not deliver them. The plaintiff claims that defendant failed and refused to deliver the policies as required by the terms of this receipt, and he asks to recover the amount of the notes, which he was compelled to pay to an innocent purchaser. The state agent, Joyce, tendered the policies to plaintiff in March, 1895, but plaintiff refused to accept them on the ground and for the reason, as now claimed, that the tender or offer was coupled with a condition that he pay the premiums. This claim on plaintiff's part is not sustained by the facts, as we shall see later.

1. The main issue in the case, and the one contested in the court below, is whether the defendant is bound by the act of Little in taking plaintiff's promissory notes in payment or settlement of the premiums due. The question turned in the court below upon whether Little had implied authority to so act. We are of the opinion that the evidence as presented in the record is insufficient to show such authority.



Little had no express authority to so act, and, on the contrary, was expressly forbidden by defendant to take or receive anything but cash in payment of premiums. He had been in the habit of taking the promissory notes of applicants in settlement of such premiums. It was his custom to do so. But in all instances the notes were payable to himself personally, and he negotiated them and remitted the money to the state agent. In some instances he sent some of the notes to the state agent, who, in turn, negotiated them, and reported the money to the company. In no instance did Little or the state agent send any of such notes to the defendant, and the record wholly fails to show that defendant had any sort of notice of such custom or habit of Little. The plaintiff claims to have known of this habit and custom of Little, but from the evidence it is clear that his knowledge was confined to notes due in sixty days,—the time within which Little had to remit to the company,—and notes payable to Little personally. But there is no suggestion that he understood that such notes were sent to the company, or that the company knew anything about them; and the circumstances surrounding such custom and habit were not such as to make it the duty of the company to inquire, or to justify an inference that it had notice. The notes given by plaintiff were payable to Little personally, not as agent of defendant, and were due and payable in one and two years. They were never delivered to defendant or to its state agent, but were negotiated by Little, who converted the proceeds to his own use. He never at any time informed Joyce or defendant that plaintiff had given the notes, and, so far as the record shows, no notice of any kind in reference thereto reached Joyce or defendant for a year after the transaction, and more than seven months after plaintiff had refused to receive the policies.

The doctrine of implied authority in an agent to do a particular act beyond the scope of his agency rests on principles of estoppel, and on the ground that it would be unjust and inequitable to permit a principal to repudiate the acts of an agent, confessedly beyond his express authority, but which the principal knowingly permitted. To make out a case of implied authority in an agent to do acts beyond and in violation of his express authority, notice to the

principal must be shown. He cannot be held to have ratified, permitted, or acquiesced in a course of dealing or conduct on the part of his agent unless he had notice of such conduct or course of dealing, or the facts surrounding such course of dealing were such as to make it his duty to inquire. *Burchard v. Hull*, 71 Minn. 430, 74 N. W. 163; *Budd v. Broen*, 75 Minn. 316, 77 N. W. 979; *Thomas v. Swanke*, 75 Minn. 326, 77 N. W. 981.

In this case there is no showing whatever that defendant had any notice that Little was in the habit of taking the promissory notes of applicants in payment of premiums, unless notice be imputed to it from the fact that its state agent had such notice. Little's authority was limited to soliciting and receiving applications for insurance, collecting the first annual premium, and delivering the policies when sent to him for that purpose. He had no authority to receive anything but cash in payment of such premiums. His instructions on this subject were explicit. The state agent had no greater authority. So far as the collection of premiums was concerned, both were bound and limited by the same restrictions. Neither could receive anything but money. In view of this, it is difficult to understand upon what principle notice should be imputed to defendant from the fact that the state agent had notice. The general rule is that notice to an agent, to be binding on, and constitute constructive or implied notice to, the principal, must be of facts within the scope of the agency, or of or concerning business engaged in by the agent by the authority of the principal. 1 *Am. & Eng. Enc. (2d Ed.)* 1146. The taking of promissory notes in payment of premiums was not within the state agent's authority. Had Little been in the habit of delivering policies, intrusted to him by defendant for delivery, upon the receipt of promissory notes in payment of the premiums, or had such a delivery been made in this case, a very different question would probably be presented.

2. We are also of the opinion that the transaction between plaintiff and Little, in so far as the promissory notes are concerned, on the evidence as presented in the record, was a personal one between them, and in no way binding on defendant, and that plaintiff never understood that he gave the notes in payment of the premium. In his application for the policies he states to the company that the

premium has not been paid, though Little then held the notes he now claims were given in payment. If he had understood that the notes had been given in payment, he certainly would have made it known when Joyce tendered him the policies in March, 1895. But he never made such a claim until long after he had refused to receive the policies, and not until he learned that the notes had been negotiated by Little. On this subject Little, who was called as a witness by plaintiff, testified as follows:

"Q. The defendant in this case never got any benefit from those notes, did it? A. No, sir. Q. Whatever there was in it, you got individually? A. Yes, sir. Q. And they ran to you individually? A. Yes, sir. \* \* \* Q. This was between you and the doctor? A. This was between me and the doctor. Q. These notes were payable to you as an individual? A. Yes. Q. And you could negotiate them? A. Yes. Q. The company had nothing to do with that at all? A. Nothing with that transaction. Q. You got the money on them yourself? A. I did."

Both these parties evidently understood that the notes belonged to Little in his individual capacity, and that the company had no interest therein. They were due in one and two years, and plaintiff well knew and understood that Little must remit the money to the company within sixty days. Joyce may have conditioned the delivery of the policies upon payment of the premium when he tendered them to plaintiff, but it is not important whether he did or not. The record is silent as to any claim or pretense by plaintiff at that time that he had paid the premium, by these notes or otherwise. He said absolutely nothing about it. His refusal to accept the policies was put upon the ground that he then had all the insurance he could well carry, and "under the circumstances" he thought he would not take them. He gave the notes to Little for the purpose of being negotiated to raise the necessary money to pay the premium due on these policies,—intrusted them to Little for that purpose,—and Little betrayed the trust. Having so acted, plaintiff should not be permitted to shift the responsibility, and burden defendant with Little's dishonesty, for which it was in no way responsible. *Herrick v. Mosher*, 71 Minn. 270, 73 N. W. 964.

3. The court below erred in permitting plaintiff to give in evidence declarations and statements made to him by the state agent,

Joyce, concerning what Joyce knew of the custom of Little in taking notes in payment of premiums. Such declarations and statements were not made by Joyce in the course of his agency, were concerning past transactions, and were wholly incompetent and inadmissible. Statements and declarations of an agent not made in the course of any business of the principal being transacted by him, but wholly with reference to past transactions, are hearsay, and not binding on the principal. *Rodes v. St. Anthony & Dak. Ele. Co.*, 49 Minn. 370, 52 N. W. 27; *Mechem*, Ag. § 714. For these reasons a new trial is granted.

Order reversed.

START, C. J.

I concur in the result on the ground that it was error for the trial court to admit in evidence the admissions of the state agent. I dissent, however, from so much of the decision of the court as in effect holds that the verdict was not sustained by the evidence. The question is not whether the agent, Little, had implied authority to accept the plaintiff's promissory notes for the first premium. The question is, did he have apparent or ostensible authority so to do? The evidence on this question was, in my judgment, such as to make it a question of fact for the jury.

On April 13, 1900, the following opinion was filed:

BROWN, J.

In denying respondent's application for a reargument, we deem it proper to add a word to what is said in the former opinion. As there stated, whether the defendant was bound by the act of Little in taking promissory notes in payment of premiums turned in the court below upon the question whether Little had implied authority to so act. If any other theory of the case was there presented or urged by counsel for plaintiff, the learned trial judge did not refer to it in his charge to the jury. But it is not important whether the plaintiff's theory be that Little had implied or apparent authority. The law remains the same. A distinction between implied and apparent authority is pointed out in *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061. Although there are features distinguishing, in a degree, implied from apparent au-

thority, it is not necessary to refer to them here; and, as counsel for respondent now relies upon the contention that Little had apparent or "ostensible" authority, we turn our attention for a moment to examine that question.

To bind a principal for an unauthorized act of his agent, on the ground that a long course of dealing and conduct on the part of the agent created or established apparent authority in the agent to do the act sought to be enforced, it must be shown that the principal had notice of such conduct and course of dealing, and permitted or acquiesced therein, or that the course of dealing was of such a nature and character as to make it the duty of the principal, as a matter of law, to know of it. If the nature of the business or dealings of the agent be of this latter character, and the principal by his culpable negligence permits it to continue, he is estopped to deny the authority of the agent. This is illustrated in *Columbia Mill Co. v. National Bank of Commerce*, supra. But, if it be not of such character, then, to bind the principal on the theory of apparent authority, it must be shown that he knowingly permitted or sanctioned the conduct and course of dealing. 1 Am. & Eng. Enc. 965, 989, 999, and notes.

Little's conduct and course of dealing were not of such a character as to make it the duty of defendant to know thereof. The company had expressly forbidden him from taking anything but money in payment of premiums, and the very receipt upon which this action is founded so informed plaintiff. The only question with reference to this branch of the case, therefore, is, did the defendant have actual or constructive notice of such course of dealing? It is beyond controversy that it had no actual notice, and the case narrows down to the question whether notice to the state agent was notice to the company. Our statutes require foreign insurance companies doing business in this state to appoint a state agent, and provide that a company shall be bound by the acts of such agent within his apparent authority. Apparent authority in an agent is such as the principal knowingly permits the agent to assume, or which he holds the agent out as possessing. 1 Am. & Eng. Enc. 989. It is a well-settled rule or principle of law that notice to an agent, to be binding on the principal, must be of facts within

the scope of the agency. Pomeroy, in his work on Equity Jurisprudence, states the rule thus:

“Also, in pursuance of the fundamental doctrine of agency concerning the powers of agents, the notice given to or information acquired by the agent, in order to be operative upon the principal, must be within the scope of the agent’s authority to bind the principal. If an agent cannot bind his principal by acts beyond the limits of his authority, a notice beyond those limits is equally nugatory.” 2 Pomeroy, Eq. Jur. § 668.

The same doctrine is laid down in *Sandberg v. Palm*, 53 Minn. 252, 54 N. W. 1109. In that case it was held that, because an agent with authority to sell land could not bind his principal by an agreement to permit a third person to erect a building on the principal’s land, notice to him that a building was being erected thereon was not notice to his principal. See also *Wharton*, Ag. 178; *Weisser’s Admrs. v. Denison*, 10 N. Y. 68; *Brown v. Bankers*, 30 Md. 39. The rule is an inseparable part of the law of agency. The statute above referred to does not in any way change or modify it. It simply provides that the company appointing such an agent shall be bound by his acts within his apparent authority. Unless it can be held, as a matter of law, that it is within the apparent authority of an agent appointed pursuant to this statute to violate his express instructions and go beyond his express authority, notice to the state agent in this case of Little’s conduct did not constitute notice to the defendant company. Authority in an agent to do an act, whether apparent or implied, cannot be derived from a violation of his authority. The state agent had no authority to bind the defendant company by taking promissory notes in payment of premiums, nor had he any authority to authorize Little to do so. Anything of this kind was not only not within the scope of the agency, but in direct violation of the authority with which he was clothed. We cannot, therefore, hold that notice to the state agent was notice to the company, without violating this fundamental rule of the law of agency.

The case of *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224, 73 N. W. 1, has no application. Counsel for respondent did not cite it in his original brief,—presumably, for the reason that it is not in point. We did not refer to it in our former opinion for the same reason. The decision in that case was put squarely upon the

ground, not only that the state agent had notice that a subagent was in the habit of taking promissory notes in payment of premiums, but that the company itself had notice thereof, and had received some of the notes so taken. Whatever may have been the state of the evidence in that case, the decision was distinctly put on those grounds. And unless this court was guilty of an intentional play with words, which we do not believe, the court understood the evidence to establish those facts.

Application denied.

COLLINS, J. (dissenting).

Counsel for plaintiff petitions for a rehearing, specifying thirteen distinct grounds therefor. I think that on one of these, at least, the petition should be granted, but a majority of the four justices who agreed on the opinion as originally filed do not take this view. As required by the insurance code (Laws 1895, c. 175, § 76), the defendant, a foreign insurance company, had appointed a state agent, and a certificate of such appointment had been duly filed. It clearly appeared from the evidence that the state agent knew that Little, the solicitor, made a practice of taking promissory notes on account of premiums, and, further, that this practice had been sanctioned by such agent. In fact, there was testimony which would have justified a finding that the state agent himself did not hesitate to disregard instructions on this point, and to take notes for first premiums. By express enactment, the acts of a state agent are made binding upon the company he represents, when they are within his apparent authority as its accredited agent. *Id.* c. 175, § 89. But our attention was not called to this statute on the original argument. This statutory rule should be closely followed, if we are to properly protect such of our citizens as have to deal with these foreign corporations, engaged in the business of fire and accident, as well as life, insurance within our borders. So on the proofs at the trial the case was not one of implied, but of apparent, authority. Nor was our attention directed to the quite recent case of *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224, 73 N. W. 1, wherein the acts of an insurance solicitor, who had, in direct disobedience of his instructions, but with the knowledge of the state agent, accepted promissory notes for first premiums, were considered. I am unable

to reconcile the views therein expressed with what has been said in the original opinion herein.

JOSEPH P. WILSON and Another v. CATHERINE J. WELLES  
and Another.

79	58
84	112
84	114

February 1, 1900.

Nos. 11,878—(192).

### **Express Trust.**

Express trusts are created by contracts and agreements which directly and expressly point out the persons, property, and purposes of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties. Within this definition it is *held* that the transaction set out in the opinion created an express trust between the parties.

### **Right of Beneficiary as Affected by Lapse of Time.**

The rights of a cestui que trust in cases of express trusts are not barred by lapse of time so long as there is no breach, disavowal, or repudiation of the trust by the trustee. Time runs against such trusts only from the date of notice to the cestui que trust of a breach or repudiation thereof by the trustee.

### **Repayment of Advances by Trustee.**

A trustee is entitled to repayment of all money advanced or paid out by him in furtherance of the trust relations.

Action in the district court for Hennepin county by Joseph P. Wilson and Charles A. Gilman against Catherine J. Welles and another, as executrices of the will of Henry T. Welles, deceased, to recover \$13,460 and interest on an express trust declared by decedent. The case was tried before Elliott, J., who made findings of fact, and as conclusion of law found that plaintiffs were entitled to an accounting, and that in stating the account defendants should be credited with certain sums and charged with other sums. From an order denying a motion for a new trial, defendants appealed. Modified.

*J. B. Atwater*, for appellants.

*Weed Munro and Calhoun & Bennett*, for respondents.



BROWN, J.

This is an appeal from an order denying appellants' motion for a new trial. Some time in 1872, the plaintiffs Gilman and Wilson and Henry T. Welles, now deceased, entered into a written contract or agreement in the words and figures following, omitting the description of the lands, to wit:

"This is to certify that I have this day sold to Chas. A. Gilman and J. P. Wilson 12 pieces of Chippewa half-breed scrip of 80 acres each, making 960 acres, and numbered as follows, viz. 149, 256, 217, 181, 262, 224, 221, 187, 240, 182, 279, and 221, at \$2.50 per acre, amounting to \$2,400, with interest at the rate of 12 per cent. per annum until paid for; said Gilman and Wilson to pay for the scrip when the land is sold; said scrip to be located on minutes of land belonging to said Gilman & Wilson at Pine Mountain Lake, in townships 139 and 140, range 31, as follows, viz., and is to be held by me in trust for said Gilman and Wilson and as security for the payment of the scrip until said lands are sold."

Then follows a full description of the lands.

Prior thereto said Gilman and Wilson had explored and examined said lands, and expended considerable time and money in so doing. Pursuant to such agreement, and with said half-breed scrip, said Gilman and Wilson selected and located said lands at the proper United States land office in the name of said Welles, but in trust, as provided in said contract, for their benefit, and as security for the repayment of the purchase price of the scrip, \$2,400, with interest at the rate of 12 per cent. per annum. After such lands had been so located and entered, such scrip and entry were cancelled by the general land office on the ground and for the reason that the scrip was void and worthless. The order so cancelling said entry contained a further order allowing the interested parties sixty days in which to perfect the title to the lands, which they could do under and by virtue of an act of congress entitled "An act to perfect certain land titles therein described," approved June 8, 1872, by the payment to the government of \$1.25 per acre.

Thereafter said Welles, in furtherance of the foregoing agreement, advanced to said Wilson and Gilman the sum of \$1,200 with which to enable them to complete the purchase, and so perfect the title to said lands. Said parties completed such purchase, and caused the patent and title therefor to be issued in the name of said Welles

in accordance with said agreement. Welles was never repaid any part of the money so advanced by him, nor paid the agreed price of the scrip. He sold an undivided interest in the lands to Franklin Steele in 1876, and his remaining interest therein to the St. Anthony Lumber Company in 1887. He died in 1898. The appellants were appointed executrices of his will, and respondents filed a claim in the probate court of Hennepin county asking for an accounting as to the proceeds of said lands. The probate court rejected the claim, but it was allowed on appeal to the district court. The district court made full and complete findings of all the foregoing facts and others, and ordered the matter referred for the purpose of ascertaining the amount due respondents.

The contention on the part of respondents is that by the transaction shown an express trust was created between the parties, and that they are entitled to an accounting. Appellants contend that no express trust was created; that, when the scrip was cancelled by the general land office, the project intended by the written contract was abandoned, and that Welles acquired title to the lands in his own right, and without reference to said contract; and that, if this contention be not true, the most that can be claimed from the transaction is that it created an implied trust only, and that respondents' rights, whatever they may have been, are barred by the statute of limitations and by their laches.

The principal question raised on this appeal and for the consideration of this court is whether the findings of fact made by the court below were sustained by the evidence. We have examined the evidence with care, and a majority of the court are of the opinion that, within the well-established rule that the findings of the trial court should be sustained on appeal if there is any evidence reasonably tending to support them, the findings in this case should be sustained, except with reference to the amount due Welles from respondents. An extended review of the evidence would serve no good purpose, and we refrain. It is sufficient to say that there is evidence in the case reasonably tending to support the findings, though it is not of the most convincing and satisfactory nature.

Express trusts are created by contracts and agreements which directly and expressly point out the persons, property, and purposes

of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties. 1 Perry, Trusts, §§ 24, 25. There can be no question but that the transaction here under consideration created an express trust between the parties. And, so long as the relation thus created remained unrepudiated by the trustee, the statute of limitations would not run, nor would lapse of time bar the rights of respondents. Time begins to run against an express trust only from the time a breach, disavowal, or repudiation thereof by the trustee is made known to the cestui que trust. *Smith v. Glover*, 44 Minn. 260, 46 N. W. 406; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244; *Chicago v. Hay*, 119 Ill. 493, 10 N. E. 29. Welles never, so far as the evidence shows, expressly disavowed or repudiated this trust, and, if there was any repudiation thereof at all by him, it was by the sale of the lands without respondents' consent, and the appropriation of the proceeds to his own use. But the court below found as a fact that the respondents did not know of such sale until within a year of the death of Welles. Both respondents testified directly to that effect, and the finding is supported.

Appellants offered in evidence two receipts, one from each respondent, for the purpose of showing a settlement and adjustment of all the matters existing between the parties, including the rights now asserted and here involved. The receipt from Wilson is quite broad, but is not conclusive. It was explained by him as not intended to include this matter, and a majority of the court hold that his explanation is sufficiently corroborated. The Gilman receipt was for \$200, and he claims that the money was advanced to him in furtherance of the trust, to pay to some person who had some interest in the lands, and was to be returned to Welles when the trust relations were settled. The explanation is deemed sufficient in view of circumstances shown in the evidence.

The court below erred in not including in the indebtedness due Welles the \$1,200 furnished or advanced by him to enable respondents to complete the purchase of the lands, and the \$200 paid to Gilman. If both these items are not to be included in such indebtedness, respondents' case falls to the ground. Their contention is that all the money advanced by Welles was so advanced in fur-

therance of the trust, and, this being so, Welles is entitled to its repayment. The written contract provided for interest at the rate of 12 per cent., and the court below will allow such rate, not only upon the \$2,400, but upon the other two items of indebtedness as well. This disposes of the case, and of all assignments of error deserving special mention.

The cause is remanded to the court below, with directions to amend its conclusions of law to correspond with the views herein expressed.

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STATE ex rel. CITY OF DULUTH v. ST. PAUL & DULUTH RAILROAD COMPANY and Others.

February 1, 1900.

Nos. 11,891—(203).

**Bridging Railway Tracks at Street Crossing—Apportionment among Roads.**

Order appealed from considered, and *held* to be in accordance with the mandate of this court on a former appeal, and is, therefore, sustained.

Appeal by defendant Duluth Transfer Railway Company and John Elliot Bowles, as receiver thereof, from an order of the district court for St. Louis county, Ensign, J., denying a motion for a new trial. Affirmed.

*John G. Williams*, for appellants.

*Hadley & Armstrong*, for respondent St. Paul & Duluth Railroad Company.

*J. L. Washburn* and *Charles W. Bunn*, for respondent Northern Pacific Railway Company.

BROWN, J.

This is a proceeding by mandamus to compel the appellant, jointly with the St. Paul & Duluth Railroad Company and the Northern Pacific Railway Company, to construct a bridge or viaduct upon Garfield avenue, in the city of Duluth, over their railway tracks as the same extend across said avenue. It was before this court at the October, 1898, term, on the appeal of the St. Paul & Duluth and

the Northern Pacific Companies from the order of the court below directing the issuance of a peremptory writ of mandamus. 75 Minn. 473, 78 N. W. 87. The present appellant did not join in the former appeal. The first order of the court below required the railway companies to jointly construct the bridge, and made no attempt to apportion the cost or expense between them. The matter was, on the former appeal, remanded, with directions to the court below to ascertain and apportion the parts of the bridge to be constructed by each company, and certain rules were laid down to guide the court in doing so. In compliance with this mandate, the district court made its further order requiring the appellant to construct 319.80 feet of the bridge, and requiring the two other companies to construct the remainder, including the approaches, or about 1,500 feet. The present appeal is from that order. The St. Paul & Duluth and Northern Pacific Companies are satisfied with the apportionment made, and do not appeal.

Counsel for appellants contends that the court below did not follow the rules laid down by this court, and that the apportionment made is inequitable and unjust. His contention is that by the former decision of this court the two railway companies, the St. Paul & Duluth and the Northern Pacific, were required to construct the approaches to the bridge independent of appellant; that appellant was not to construct any portion of such approaches, but only its equitable proportion of the bridge proper. His contention cannot be sustained. The intention of this court is plainly indicated in and by the former decision, and the apportionment made by the court below is clearly within the rules laid down. This court intended that each company should be required to bear its just and equitable proportion of the entire expense of the bridge, including the approaches thereto, such proportion to be ascertained and determined from a consideration of the extent and part of the street occupied by the tracks of each, and such other circumstances as bore upon their several interests and rights. There can be no question, leaving out of consideration the suggested poverty of appellant, but that this was an equitable and just manner and basis of adjusting the cost and expense of the bridge. Counsel for appellants offers no better rule, and further reflection on our part does not suggest any im-

provement on the rule adopted. The court below correctly applied the rule.

We are unable to discover any error, or to say that the apportionment made is unjust or inequitable, and the order appealed from must be affirmed.

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H. H. GRUBER v. GRAND LODGE ANCIENT ORDER UNITED WORKMEN.

February 2, 1900.

Nos. 11,865—(202).

**Benefit Association—Beneficiary Named in Certificate.**

M. became a member of defendant, an unincorporated association, and received a certificate, in which it was stated that he was entitled to all of the rights and privileges of membership, and to \$2,000 of the beneficiary fund at his death, to be paid "to his cousin," G., this plaintiff. M. died more than five years afterwards, having remained a member in good standing, paying all assessments made against him on account of the beneficiary fund. G. was not a cousin of the deceased, nor was he related to him in any manner. The association refused to pay solely for that reason. Its articles provided that, in case of the death of a member, moneys due on the certificate should be paid "to the person and in the order herein-after named and not otherwise: \* \* \* (1) To the person designated in the certificate, when designated by name, and a person related to the deceased, or a member of his family or dependent upon him. (2) Where such person is not living at the time of payment in such case: First, to the wife and children of the deceased, share and share alike; second, to the wife of the deceased; third, to his father and mother, share and share alike; fourth, to the surviving father or mother; fifth, to the brothers and sisters of the deceased, share and share alike, or their living issue, according to the right of representation; sixth, to the surviving brother or sister, if no issue of other brothers or sisters is living; seventh, to the next of kin of the deceased, according to the statute of distributions of the state of Minnesota, and to no other persons whomsoever." There was no express provision of the articles which prohibited G. from being designated as a beneficiary. *Held*, that the provisions above quoted as to the order of payment were not a limitation of the power of the association, so as to prevent it from recognizing G. as a properly designated beneficiary, in the absence of fraud, and there being no question of public policy involved.

**Estoppel.**

When an association of this character voluntarily, and in the absence of fraud, issues a certificate in which a beneficiary is designated by name, said person not being expressly prohibited from being named as sole beneficiary in the articles or by-laws, and there being no question of public policy involved, and thereafter and for a term of years collects and receives the amounts assessed against the member on account of death claims made against the beneficiary fund, it will not be allowed to defeat recovery on the certificate upon the ground that the beneficiary could not be named as such, and therefore the certificate was ultra vires.

Action in the district court for Ramsey county to recover \$2,000, and interest, on a beneficiary certificate. The case was tried before Brill, J., who directed a verdict in favor of defendant. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed.

*Edmund S. Durment, Albert R. Moore and John E. Hearn, for appellant.*

Defendant is a mutual assessment life insurance society, and nothing else. *Bolton v. Bolton*, 73 Me. 299; *Foster v. Moulton*, 35 Minn. 458, 459; *State v. Critchett*, 37 Minn. 13; *Walter v. Hensel*, 42 Minn. 204, 209. The subordinate lodge is the agent of the grand lodge in these matters. *Niblack, Ben. Soc.* § 281; *Barbaro v. Occidental*, 4 Mo. App. 429, 433; *Russell v. Detroit*, 80 Mich. 407. Presumptively the designation of plaintiff was valid, and in order to defeat recovery it must appear that his designation as such was clearly prohibited by the constitution of the order. All doubtful provisions will be resolved in favor of the validity of the designation. *Walter v. Hensel*, supra; *Cook v. Benefit League*, 76 Minn. 382; *Symonds v. N. W. Mut. Life Ins. Co.*, 23 Minn. 491; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85.

The grand lodge might incorporate without limiting the designation of beneficiaries to any class of persons (G. S. 1894, § 2990, and amendments), and therefore there is no reason of public policy which would justify holding that any limitation of the right of designating a beneficiary is intended or implied, unless the language of the constitution unequivocally declares such limitation. Giving due

weight to the settled rules of construction, it does not appear that the constitution of defendant does prohibit the designation.

The same rules of estoppel and waiver apply in case of defendant as in case of other insurance companies; and it waived the objection (if it be an objection), and is estopped to assert that plaintiff was not legally named beneficiary. Deceased was not a member of the grand lodge, and its constitution is not referred to in the certificate. Under the provision relied upon, deceased's membership did not arise until he received or became entitled to the certificate. He was not chargeable with notice of the alleged want of power in defendant to make the contract, for he was not in any event chargeable with knowledge of the constitution until he became a member. *Given v. Rettew*, 162 Pa. St. 638; *Eilenberger v. Protective*, 89 Pa. St. 464, 468. The provision relied upon was simply a rule of guidance for its agent, the subordinate lodge. If its agent disregarded the rule, the principal, having in fact made the contract, is bound by it in the absence of fraud, not having repudiated it at any time before full performance by the deceased.

The constitution is merely a voluntary agreement, or rules voluntarily adopted for the government of defendant, which may be changed at any time. The constitution is simply the by-laws, and has no greater force. *Niblack, Ben. Soc.* § 14; *Supreme v. Knight*, 117 Ind. 489, 495. If the constitution is a part of the contract, then every part of the constitution is equally such, and every provision of the constitution stands on the same basis. But there are many provisions of such constitutions which the courts have held the order to have waived or estopped itself to assert. This provision as to beneficiaries is not a material one, and for that reason could be waived. *Oswald v. St. Paul G. Pub. Co.*, 60 Minn. 82, 85; *Central B. & L. Assn. v. Lampson*, 60 Minn. 422; *Erb v. Yoerg*, 64 Minn. 463, 465; *Emmet v. Reed*, 8 N. Y. 312, 316; *Story v. Williamsburgh*, 95 N. Y. 474; *Durian v. Central*, 7 Daly, 168, 173; *Folmer's Appeal*, 87 Pa. St. 133, 135; *Maneely v. Knights*, 115 Pa. St. 305, 308; *Humphreys v. National*, 139 Pa. St. 264, 271; *Milborne v. Royal*, 14 App. Div. (N. Y.) 406; *Matt v. Roman*, 70 Iowa, 455, 461; *Mutual v. Hoyt*, 46 Mich. 473, 478; *Russell v. Detroit*, 80 Mich. 407; *Bloomington v. Blue*, 120 Ill. 121; *Burlington v. White*, 41 Neb. 547; *Railway v.*



Tucker, 157 Ill. 194, 199. See also upon question of waiver and estoppel in cases of mutual companies and benevolent societies: Seibel v. Northwestern, 94 Wis. 253, 257; De Witt v. Home, 95 Wis. 305; National v. Titman, 58 Ill. App. 642, 644; Knights of Pythias v. Kalinski, 163 U. S. 289, 291; Kentucky v. Calvert (Ky. App.) 9 Ins. L. J. 529; Milkman v. United, 20 R. I. 10; Mueller v. Grand Grove U. A. O. D., 69 Minn. 236; Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 88; Davidson v. Old People's Mut. Ben. Soc., 39 Minn. 303.

The deceased had an insurable interest in his own life, and having taken the certificate on his own application, and paid the premiums himself, was at liberty to name any person as beneficiary. Walter v. Hensel, *supra*; Olmsted v. Keyes, 85 N. Y. 593; Bloomington v. Blue, *supra*; Campbell v. New England, 98 Mass. 381, 389; Hill v. United, 154 Pa. St. 29, 36; Milner v. Bowman, 119 Ind. 448; Robinson v. U. S. Mut. Acc. Assn., 68 Fed. 825; American E. L. Ins. Co. v. Barr, 68 Fed. (C. C. A.) 873, 878.

*E. & W. N. Southworth and Chas. G. Hinds*, for respondent.

Defendant is a mutual benefit society. Jewell v. Grand Lodge A. O. U. W., 41 Minn. 405; G. S. 1894, § 3294. Members of a mutual benefit society and those claiming under them as beneficiaries must take notice of and are bound by its articles of association and by-laws. Davidson v. Old People's Mut. Ben. Soc., 39 Minn. 303; Hesinger v. Home Ben. Assn., 41 Minn. 516; Mills v. Rebstock, 29 Minn. 380; Finch v. Grand Grove U. A. O. D., 60 Minn. 308; Richmond v. Johnson, 28 Minn. 447; Scheufler v. Grand Lodge A. O. U. W., 45 Minn. 256. Where the statute, the charter, or the by-laws of such a society prescribe who may become beneficiaries, only those who belong to the prescribed class can be beneficiaries. 16 Am. & Eng. Enc. 46; Id. 929, 960; Ownby v. Supreme, 101 Tenn. 16; Knights v. Rowe, 70 Conn. 545; Love v. Clune, 24 Colo. 237; Supreme v. Bennett, 47 N. J. Eq. 39; Skillings v. Massachusetts, 146 Mass. 217; Supreme v. Perry, 140 Mass. 580; Britton v. Supreme, 46 N. J. Eq. 102; Supreme v. Smith, 45 N. J. Eq. 466; Sanger v. Rothschild, 123 N. Y. 577; Alexander v. Parker, 144 Ill. 355; Palmer v. Welch, 132 Ill. 141; Elsey v. Odd Fellows, 142 Mass. 224; Michigan v. Rolfe,

76 Mich. 146; *Supreme v. McGinness*, 59 Oh. St. 531; *Norwegian v. Wilson*, 176 Ill. 94. These provisions are general and will control in all matters not specifically provided for; but where there are specific provisions, they will control if there be inconsistency. 23 Am. & Eng. Enc. 426-429. But there is no inconsistency between the provisions of article 14 and the laws and usages of the supreme lodge, nor any attempt to show that they are not consistent.

If the certificate is valid, the amount must be paid to the heirs of Maguire. Payment to plaintiff will be no defense, when those heirs present their claim. If defendant could waive its rights in the premises, it could not waive the rights of these heirs, and their right to recover would not be affected by payment to plaintiff. *Jewell v. Grand Lodge A. O. U. W.*, supra. The recorder of a subordinate lodge has not authority to waive the requirement of the constitution as to who may become beneficiaries. 1 Am. & Eng. Enc. (2d Ed.) 987-989. Information received by him will not be imputed to the grand lodge. *Trentor v. Pothan*, 46 Minn. 298; *Sandberg v. Palm*, 53 Minn. 252; *Jefferson v. Leithauser*, 60 Minn. 251; 1 Am. & Eng. Enc. (2d Ed.) 1146-1148; *Supreme v. Green*, 71 Md. 263; 2 Bacon, Ben. Soc. (2d Ed.) § 429b.

#### COLLINS, J.

In his lifetime, James Maguire, an unmarried man, was a member of defendant beneficial association. He held its certificate of date December 31, 1892, whereby it was certified that he was entitled to all of the rights and privileges of membership and to the sum of \$2,000 of the beneficiary fund at his death, to be paid "to his cousin, H. H. Gruber." Maguire died February 24, 1898, having been all of the time a member in good standing in his subordinate lodge. He had in every particular complied with all of the rules, regulations, and requirements of the order, and until after his decease no question was raised as to his right to designate Gruber as the beneficiary, or that such designation was invalid and inoperative. After his death, the defendant refused to pay, solely upon the ground that Gruber was not Maguire's cousin, or in any manner "related" to him, nor was he a member of his family, or dependent upon him. For the purposes of this appeal it is conceded that Gruber was not "related" to Maguire, nor was he a member of his family or a depend-

ent. Both parties moved at the close of the trial for a directed verdict. The court thereupon ordered a verdict for defendant, which was returned. Thereafter the plaintiff's counsel made a motion in the alternative in accordance with the provisions of Laws 1895, c. 320. This motion was in all things denied, and plaintiff appeals.

The articles of association under which defendant issued and paid beneficial certificates are not as clear as they should be, and in passing it is not out of place to say that they have been materially changed since the decision in *Jewell v. Grand Lodge A. O. U. W.*, 41 Minn. 405, 43 N. W. 88. It is provided (article 13, § 6) that in the beneficiary fund of \$2,000 the members themselves have no individual property right. It does not constitute a part of their estate to be administered, nor have they any right in or control over the same

"Except the power to designate the person or persons to whom, as beneficiaries, the same shall be paid at the death of the member."

The beneficiaries thus designated have no vested right in said sum until the death of the member gives such right, and the designation may be changed by the member, in the method prescribed by the laws of the order, at any time before his death. In the next article (14, § 1) it is provided that

"Upon the death of a workman in good standing in a subordinate lodge in this jurisdiction, the moneys payable under his certificate shall be paid to the person and in the order hereinafter named and not otherwise: \* \* \*

(1) To the person designated in the certificate, when designated by name, and a person related to the deceased, or a member of his family or dependent upon him.

(2) Where such person is not living at the time of payment in such case: First, to the wife and children of the deceased, share and share alike; second, to the wife of the deceased; third, to his father and mother, share and share alike; fourth, to the surviving father or mother; fifth, to the brothers and sisters of the deceased, share and share alike, or their living issue, according to the right of representation; sixth, to the surviving brother or sister, if no issue of other brothers or sisters is living; seventh, to the next of kin of the deceased, according to the statute of distribution of the state of Minnesota,—and to no other persons whomsoever."

These are all of the provisions in the articles which bear upon the right of a member to designate his beneficiary, and it is to be ob-

served that there is no express and positive prohibition as to a beneficiary. It is not enacted in unequivocal terms that the beneficiary must be one of a certain class, such as a member's wife, or a relative within a certain degree of consanguinity, or one of the member's family, or one who is dependent upon him; and the nearest approach to any enactment upon this particular subject is the language whereby it is provided in article 14 that the money must be paid "to the person and in the order hereinafter named and not otherwise."

Now, when we examine the subsequent provisions to which the quoted words refer, we find that by the first subdivision payment is to be made to the person designated, if designated by name, and a person "related" to the deceased. If by this it was intended that the beneficiary, when named, must be some sort of a relative, the language chosen was quite inept, and possibly needs revision. The expression used suggests conditions and complications arising on the decease of a member which might end in defeating not only the wish of the deceased, as indicated in his designation of a beneficiary, but also the very object of the association,—that of providing a sum of money for the use of the widow of the deceased, or for his children, or for his aged parents, or possibly for some other persons related by consanguinity or affinity. Suppose the beneficiary is not designated by name, must he be related, or one of the member's family, or a dependent? And upon looking at the second subdivision we find that no provision whatsoever is made in case the beneficiary designated by name is ineligible and incapable of receiving the money, and is living when payment is to be made. He might conveniently die in time to set the second subdivision in motion, but, if he survives the member, its provisions are inoperative, for the only contingency covered by this second subdivision, unless words are read into it, is that which will arise in case a beneficiary designated by name is not living when the pay day arrives. And nowhere else in the articles do we find provisions which will prevent an absolute forfeiture to the defendant association in every case of such a character.

To illustrate: Unless plaintiff can recover, the defendant can resist payment as against the world, so far as we can now perceive.

Its counsel argue, as a reason why plaintiff should not succeed, that Maguire's kinsmen may present a claim, and that payment to plaintiff would be no bar to a recovery. We find nothing in the articles which would justify these kinsmen in an attempt to collect the money in dispute, whether plaintiff is successful in this action or is defeated. There seems to be no provision for payment to any person not designated in the certificate, except when the person designated is deceased at the time payment is to be made.

But an exact and abiding construction of the language used in these articles is not necessary to a decision of the case now before us, as we regard it. Maguire's application was made before the certificate was issued, and in the form, we must presume, laid down in the articles. This application was not introduced in evidence, so there is nothing of record tending to show what statements or representations were therein made as to Gruber's relationship to the applicant, or why he thought him qualified for such designation. Nor was there any claim made at the trial that, in causing the plaintiff to be designated as beneficiary, Maguire made any fraudulent representations to defendant, or that because of false statements or representations on his part the defendant had issued the certificate in question. It had an opportunity, when the application was presented, to pass upon the competency or eligibility of Gruber to receive the money; and it certainly acquiesced in his being designated by name, for it issued the certificate. From that time, December 31, 1892, to the time of his decease, February 24, 1898,—over five years,—Maguire continued to comply with all of defendant's rules and regulations. He contributed to the beneficiary fund when admitted to the order, and thereafter, and up to the day of his death, met and paid the assessments made from time to time, as was necessary to meet death claims. He was never delinquent when called upon to pay into the fund in question, and undoubtedly relied upon a well-founded belief that when he should pass away the surviving members would contribute to the \$2,000 mentioned in his certificate quite as promptly and with as good grace as had been his custom. And unquestionably the defendant association received his payments in the belief that the beneficiary whom he had selected, and whose name had been designated in the certificate when issued, was

entitled to and would receive the money, when, in the course of natural events, it would become due and payable. Nor can it be denied that fair dealing and common justice require that the sum in question should be paid to plaintiff.

As we have stated, Maguire was not prohibited in express terms from designating a person not related to him as his beneficiary. And, if plaintiff cannot recover, the amount is forfeited to the association, simply because, as we construe its articles, it has failed to provide for a case of this kind; that is, for a case where the beneficiary named is living, but cannot take, at the death of the member. It is true that when a certificate is issued to a member of one of these unincorporated beneficial associations the articles and by-laws enter into and become a part of the contract. And it is also true, we presume, that the subdivisions we have quoted from article 14, § 1, contemplated that the person designated as a beneficiary in such certificate should be a relative of the member, or one of his family, or a person dependent upon him, and that payment should be made to a beneficiary of one of these classes. But this language was not a limitation of the power of the association, so as to prevent it from recognizing as a proper beneficiary a person who might be designated as such by the member, there being no claim of fraud, and there being no question of public policy involved. Such designation in itself was not a fraud upon the association. Its obligation to pay was not enlarged in any way by the naming of plaintiff as the beneficiary. Such designation was made by Maguire. It was assented to by the defendant, and relied and acted upon by both parties. It was never repudiated by either until it was too late for a change, and it was binding. *Story v. Williamsburgh*, 95 N. Y. 474; *Maneely v. Knights*, 115 Pa. St. 305, 9 Atl. 41.

When an association of this character, in the absence of fraud, voluntarily issues a certificate in which a beneficiary is designated by name, said person not being expressly prohibited in the articles or by-laws from being so named, there being no question of public policy involved, and thereafter and for a term of years collects and receives the amounts assessed upon the member on account of death claims asserted against the beneficiary fund, it will not be allowed to defeat a recovery on the certificate on the ground that

the beneficiary could not be named as such, and therefore the certificate was ultra vires. *Bloomington v. Blue*, 120 Ill. 121, 11 N. E. 331. Although not strictly analogous to this case, there are decisions of this court in which it has been held that a beneficial association may waive strict compliance with its articles, and thus become estopped to insist upon a forfeiture. *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82, 88, 50 N. W. 1022; *Mueller v. Grand Grove U. A. O. D.*, 69 Minn. 236, 72 N. W. 48.

The order appealed from is reversed, and, when a remittitur is filed below, the court will order judgment against defendant for the amount due upon the certificate, with interest, costs, and disbursements.

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JEROME UTLEY v. JOSEPH R. CLEMENTS and Another.

February 2, 1900.

Nos. 11,910—(197).

### Partnership—Fraudulent Dissolution.

From about September, 1886, until October 19, 1894, C., G., and T. were concededly copartners in the banking business under the firm name of the Fillmore County Bank. On the day last mentioned these three persons signed a dissolution notice, in which it was stated that the copartnership was dissolved by mutual consent, and that G. and T. were successors, had assumed all indebtedness, and would collect all accounts. C. retired from all visible participation in the business. G. and T. continued the same until August 20, 1898, when the bank closed its doors, being insolvent. G. died soon afterwards. In this action, brought against C. and T. as surviving members of the firm first above mentioned, by a creditor holding claims on account of deposits made in the bank subsequent to the signing of the dissolution notice, the court below found as a fact that C., G., and T. continued in business as copartners, and under the firm name of the Fillmore County Bank, until the bank closed its doors, and also, in substance, that the alleged dissolution was a sham, and a part of a conspiracy entered into between C. and T. in pursuance of a joint scheme and plan to defraud. *Held*, that this finding was supported by the evidence.

### Books of Account—Erasures and Alterations.

*Held*, also, that the trial court did not err when it received in evidence

79	68
82	487
82	440
82	451

certain entries made in the books of account kept in the business of the bank prior to the pretended dissolution, which entries had been erased and altered in pursuance, according to oral testimony, of the aforesaid joint scheme and plan, and which tended to show that large sums of money, the funds of the bank, had been appropriated by C., and that evidence thereof had been removed, wholly, or in part, by these alterations.

### **Rulings of Court.**

Further rulings of the trial court when receiving the evidence considered and disposed of.

Action in the district court for Fillmore county against Joseph R. Clements and Maurice R. Todd, as surviving partners of a copartnership formerly existing between said defendants and Julia F. Greenleaf, since deceased, under the firm name of the Fillmore County Bank, to recover \$24,292.75 with interest on certificates of deposit. The case was tried before Kingsley, J., who found in favor of plaintiff in the sum of \$25,708.03. From a judgment entered pursuant to the findings, defendant Clements appealed. Affirmed.

*Losey & Woodward* and *Webber & Lees*, for appellant.

*H. S. Bassett, Brown & Abbott* and *Stephen H. Somsen*, for respondent.

### **COLLINS, J.**

Counsel for defendant Clements fairly state this case in their brief, as follows:

"This action was brought by the plaintiff to recover of the defendants, Joseph R. Clements and Maurice R. Todd, as surviving partners of a copartnership previously existing between said defendants and one Julia F. Greenleaf, since deceased; said copartnership having conducted a general banking business at the village of Preston, in the county of Fillmore, and state of Minnesota, under the copartnership name of the Fillmore County Bank. Said copartnership was formed in September, 1886; and the Fillmore County Bank, under which name said three named persons commenced to do business, continued to receive deposits and do a general banking business until August 20, 1898, when said bank closed its doors and ceased to do business. Subsequent to the time said bank closed



its doors, and prior to the commencement of this action, said Julia F. Greenleaf died. It was claimed on the part of plaintiff that appellant, Joseph R. Clements, continued a member of said copartnership from the time said bank commenced to do business until it closed its doors. On the part of appellant it was contended that said copartnership between himself, Julia F. Greenleaf, and Maurice R. Todd was dissolved on October 19, 1894, since which time he claims to have been in no manner interested in said Fillmore County Bank, or in any manner to have been connected with Julia F. Greenleaf or Maurice R. Todd; nor had he any knowledge of or connection with said banking business after said date.

"Plaintiff at the time said bank closed its doors held four several certificates of deposit issued by said bank, and some twenty-two other parties likewise held certificates of deposit issued by said bank; and the Bank of New Richland had also deposited with said Fillmore County Bank several thousand dollars in open account, subject to check in the usual course of banking. The plaintiff procured from all of these parties assignments of their respective demands, and brought this action to recover the sum thereof, which aggregated \$24,292.75. Each and every of these deposits were made subsequent to October 19, 1894, none of them being earlier than March 15, 1895; and each and every of said certificates of deposits were issued and signed by 'Greenleaf & Todd, Bankers.'

"The cause was tried to the court without a jury, the chief bone of contention being whether or not the defendant Clements continued to be a member of said copartnership. The court found against the contention of defendant Clements, and found that he was a member of the copartnership from its commencement until it ceased to do business, and ordered judgment for the plaintiff as demanded in his complaint. Judgment was entered upon said findings September 15, 1899, and from such judgment the defendant Joseph R. Clements brings this appeal. The evidence at the trial consisted largely of drafts, certificates of deposit, numerous entries in the books of account kept by the bank," (the original exhibits being produced for our inspection at the argument here).

A large number of assignments of error have been made, but

counsel have grouped them with great success, and they may be considered in the same manner.

1. Several of these assignments go to the sufficiency of the evidence to support the finding that there was no dissolution of the copartnership in 1894, as claimed by counsel, and also that the pretended withdrawal of Clements in November of that year was a sham, and was made for the purpose of cheating and defrauding present and future creditors of the bank. The latter part of this finding, with respect to the purpose of the pretended withdrawal of Clements from the previously existing firm, is made the subject of a special assignment of error; and, to dispose of this point, it is well to say at this time that if the main finding, as to the continuance of the copartnership down to the day of the collapse in August, 1898, was sustained by the proofs, the motive which prompted Clements to pretend to withdraw in 1894 is of no consequence, and the finding as to his purpose becomes immaterial. We therefore pass to a consideration of the evidence, some of which Clements' counsel insist was inadmissible, upon which was based the principal finding of fact.

Four days after the bank failed, Todd was arrested and incarcerated in jail. He was there confined when he testified as the plaintiff's chief witness in this action. His story as to the manner in which the funds of the bank were abstracted by Clements before and after the alleged dissolution, and in fact corroborated and conclusively established by documentary proofs, was remarkable, although not without its duplicate in these days, when an attractive sign on the outside of a building, a finely-finished counter, and a few blank books on the desks inside, seem to be all of the capital needed in order to start a bank, and all that is required to establish men of good address in position to "confidence" and swindle the people in almost any community. Todd's testimony was that, from the beginning to the end of this financial enterprise, Clements was one of the firm, and that the written notice of dissolution executed October 19, 1894, by the three persons who had previously been copartners, and the two receipts,—one dated October 25 of that year, and the other March 12, 1896,—in each of which Todd, in behalf of the firm of Greenleaf & Todd, acknowledged full payment

of all claims and demands against Clements, were devised, signed, and delivered as a part of the scheme previously concocted to loot the bank.

Clements and Todd were traveling dentists prior to 1886. They first became acquainted in 1858, when boys, and had always been intimate friends. Mrs. Greenleaf, a widow with some means, was Todd's mother-in-law, and lived in his family. When the co-partnership was formed, and the bank started, all three of the partners moved to Preston from La Crosse, Wisconsin, and there made their residence. Mrs. Greenleaf, who seems to have had great confidence in Todd, contributed \$11,500 of the bank capital, Todd about \$3,000, while Clements, although posing as a capitalist, contributed nothing but his presence occasionally behind the counter. Todd was the active manager.

Soon after the execution of the notice of dissolution, Clements removed to his former home, La Crosse, and, according to the testimony, never returned to Preston, although living within 50 miles,—about two hours' ride by rail. The notice of dissolution, composed as if for publication, was never published. In newspapers issued for the use and benefit of banks and bankers, it was stated that Clements had withdrawn from the firm; and the words "Greenleaf & Todd, Bankers," were thereafter stencilled upon blank drafts, certificates of deposits, and stationery then on hand. Business was continued after Clements removed about as before,—obtaining money on deposit, and issuing certificates bearing a good rate of interest. There were some open accounts, and among them one with the "Bank of New Richland," which seems to have been organized by Clements in December, 1894, and transferred by him to the firm of Cramm & Fish in March following. This firm continued the account, and had quite a sum of money to their credit when the Preston bank closed. It is obvious from an examination of the books that both before and after the alleged dissolution the funds of the last-mentioned concern, the Preston bank, were not used in legitimate banking, but were regularly and gradually taken and placed out of sight.

This brings us to Todd's explanation of the methods adopted to accomplish this, prior to the alleged dissolution. He testified that

the money was taken, largely, by means of drafts made payable to Clements' order, and also in cash; entries being made in the books, true as to the amount taken, but false as to the stated purpose or use for the money. Turning to the books, the witness called attention to a large number of entries which had been tampered with, where erasures had been made of names, and other names inserted in lieu thereof. His assertion was that these mutilations, erasures, and changes were made by himself, sometimes assisted by Clements, in pursuance of a plan adopted, upon Clements' solicitation and suggestion, "many months," as he expressed it, before the latter ostensibly retired from the concern, and that they consisted principally in removing Clements' name by means of chemicals furnished by him, and inserting in place thereof Todd's name; the plan and scheme being to remove from the books all evidence of charges to Clements on account of moneys had by him and all evidence that he had habitually taken money belonging to the bank. Certain it is, from a close examination of a number of these entries, that an attempt was made with chemicals to remove Clements' name as the recipient of the funds of the bank, and to substitute Todd's name instead. It was also shown beyond question that the name originally written as the debtor's in many other entries of a like character had been fully erased in the same manner, and Todd's name inserted. The latter testified that all of these changes were made in pursuance of the plan, and in anticipation of Clements' pretended retirement from the firm, and, with two or three exceptions, —accidental omissions,—were made before such retirement.

A casual examination of these books will convince any person that these alterations were made, and it must follow that the motive or purpose was not an honest one. If, without contributing a dollar to the capital of the concern, and without rendering services for which it was agreed that Clements should be compensated, or for which he was entitled to compensation, we find that he was habitually drawing out money, the natural inquiry would be: For what purpose was the money taken, and why? Was it an honorable transaction, or did the party intend to plunder the depositors? If his intention was to loot the bank, would the scheme be facilitated, and his escape from personal responsibility be made more certain,

by the removal of all entries in the books which indicated that he had received large quantities of money unlawfully and fraudulently? If it was agreed between himself and a partner, already a party to the nefarious enterprise, that within a short time the active man in the scheme should pretend to withdraw from the firm, to discontinue, apparently, all connection with the business, and to remove to another town, when, as a matter of fact, he was to remain as much a member of the concern as he had ever been, and was to continue his depredations upon a different plan,—would the alterations in the books we have mentioned aid and assist him in escaping detection when the end was reached? Surely they would, if skilfully done; and Clements' name in connection with these entries was completely erased. And the fact that the attempt was made, with more or less success, was corroborative of the oral testimony as to the motive and purpose of the interested parties.

Such testimony also tended to corroborate Todd's statement as to the real facts concerning the alleged dissolution, and the exact relations of these parties thereafter. And there was further testimony tending to corroborate Todd. He testified that as part of the scheme which led to expunging, as far as possible, Clements' name from the books of account, drafts upon other banks, which had been issued to him prior to 1893, which bore his indorsement, and on which he had received the funds of the Fillmore County Bank, had been destroyed, and that it was the intention to destroy all drafts of this nature which, after being paid by the drawee, had been returned to the drawer, the defunct bank. But there were produced at the trial, having been found among the papers of the bank, 36 of these cancelled drafts, all of which were drawn upon other banks by Todd himself, and nearly all of which were made payable to Clements and bore his indorsement, having been collected through a bank at La Crosse. Of these, eighteen were issued in 1893, and all but three were made payable to, and had been indorsed by, Clements. These three (a total of less than \$25) were made payable to other parties, in payment of Clements' bills, according to Todd. These 1893 drafts amounted in the aggregate to more than \$1,900. Seventeen of these drafts were issued in 1894; the total thereof being nearly \$1,800, and all but one made payable

to Clements, and indorsed by him, nearly all to the La Crosse bank before mentioned. One for \$8.85 was made payable to the order of a third party, one of Clements' creditors, according to Todd. And the last of these drafts was dated March 4, 1895, for the sum of \$700, payable to Clements, indorsed by him, and collected by the same bank at La Crosse.

It may also be noted here that one of the 1894 drafts, for \$200, was dated October 19,—the day on which the dissolution notice bore date. After this (November 10) a draft for \$100 was issued, and still later (March 4, 1895, as before stated) came the \$700 paper. When issuing these drafts, Todd resorted to various subterfuges in order to conceal their real payee; the object evidently being to keep Clements under cover when trouble came. They show conclusively that, of the funds of the bank, Clements converted to his own use nearly \$4,000 in 1893 and 1894, and that after the purported dissolution he received in the same way \$800. In conclusion, on this branch of the case, we wish to again call attention to Todd's testimony that Clements originated the scheme to abstract money in the manner in which it was taken, and aided in making the alterations in the books.

We now come to the operations after the paper dissolution, conducted on a different plan. Clements kept away from Preston, but Todd made frequent visits to him at La Crosse; usually going there two or three times a month, and carrying currency in his pockets, which was delivered to Clements. To account for the disappearance of this currency, he charged it up on the books to various items of expense and to fictitious parties. The bank failed to open its doors on Monday, and on the Saturday evening before Todd made a clean sweep, taking all that was left (\$195), and, going to La Crosse, made his final deposit with Clements. Todd's estimate of the amount appropriated by Clements prior to October 19, 1894, was \$30,000. His estimate as to the amount taken after that date was \$10,000. And the books of account fully justify the statement that these amounts were taken by one or both of these men. Todd confessed himself to be a criminal, and that he became such deliberately. He stood before the court below, and told the story of his shame in a clear and apparently straightforward manner, sparing himself not at all.

Although insisting when testifying that Clements received all of the money, Todd took upon himself a full share of the responsibility, and in no manner did he attempt to diminish the enormity of his own offense at the expense of his associate. He was subjected to a most severe cross-examination by astute counsel, but at no time was the apparent truthfulness of his version of the transaction affected. His verbal assertion as to the manner in which the money was taken out of the bank's funds, and as to the methods pursued to put it into the possession of his accomplice, Clements, was supported by proof of the original entries in the books of accounts and by the drafts we have mentioned. And this testimony, oral and documentary, tended to show that the relations of Clements to the bank and to Todd and Mrs. Greenleaf remained the same after the paper dissolution as before, and that he was just as much a member of the firm up to the time of the failure as he had been at any time previous. That it also proved him to have been a scoundrel, engaged in wrecking the firm and the business, detracts nothing from the foregoing assertion.

We are of the opinion that upon Todd's testimony and the corroboration hereinbefore mentioned the court below was justified in making the finding in question. And, when considering the weight to be given Todd's statements as they appear in the record, we must not overlook the fact that the trial court saw the self-condemned witness when he was testifying, and could much better judge of his truthfulness than can any one who reads his story in print. But this finding was not wholly based upon Todd's statements. Two witnesses testified that after the pretended dissolution, and after Clements had removed to La Crosse, he told them, in substance, that he was still connected with the Fillmore County Bank, and that he was out of the firm only in form. From what seems to have been his connection both before and after he removed to La Crosse, it is apparent that he was more truthful than discreet when making these statements.

And there is another feature of this case to be considered when weighing the evidence. Clements' testimony was taken on deposition at La Crosse. He testified as to the dissolution in 1894, identifying the notice thereof before mentioned, and as to some matters

of routine in the bank. He also denied making the statements as to his continued connection with the firm. But at no time, nor in any manner, did he deny Todd's statements as to the purloining of the money for his benefit, and its conversion by him. He wholly refrained from denial or explanation, although, as before stated, he resided but 50 miles from the place of trial. This is a circumstance which might, and probably did, have its influence with the court below when it considered the value of Todd's testimony.

2. We will now consider such of the other assignments of error as are, in our opinion, deserving of comment. Counsel are certainly mistaken when saying that "the whole of Journal A" was received in evidence. The offer was as to that part of the journal which showed an account with Clements. But even this method of showing the entries under his name was abandoned, and thereafter counsel proceeded as they had theretofore,—by calling Todd's attention to each entry.

3. What has been said as to the relevancy of proof of entries upon the books prior to the alleged dissolution originally made against Clements, but altered in pursuance of the schemes to defraud, disposes of assignment numbered 19. This evidence, as did other evidence produced and received, tended to show the general plan of fraudulent operations, which, among other things, included a pretended dissolution, and the execution and delivery of false receipts.

4. Todd was permitted to state that the money covered by the 1893 and the 1894 drafts was taken by Clements as one of the firm, and was not drawn out or received by him as a loan; and counsel insist that the question which elicited the statement was objectionable, because it called for the witness' opinion. We think not, for the inquiry was simply as to a fact. It may have been a superfluous question, for it was undisputed that Clements was not hiring the money as a customer of the bank. He was taking it as one of the firm, in pursuance of a deliberate plan to appropriate the deposits about as rapidly as possible, and keep the concern going for a few years. Nor was there any error in permitting the witness to testify that Clements' promise to return the money was merely verbal, and never in writing.

5. Mrs. Greenleaf's testimony was taken by deposition in another



action, but it was stipulated by counsel that in so far as it was competent, relevant, and material, it might be used on this trial. She testified that on one occasion Todd told her that "he had got rid of Clements," this being about the time the latter removed to La Crosse. On the cross-examination, defendants' counsel propounded certain questions, which Mrs. Greenleaf answered; such questions and answers being as follows:

"Q. You understood, after Mr. Todd told you that he had got rid of him, that he had got rid of him for all purposes? A. Why, I supposed so. Q. And you understood that he had separated from him in every way? A. I took it for granted. Q. Took it for granted that he had separated from him in every way, did you? A. Yes."

This subject was taken up by plaintiff's counsel on the redirect as follows:

"Q. Mrs. Greenleaf, in answer to the attorney's question you stated that, by Mr. Todd's remark to you that he thought you had got rid of Mr. Clements, you stated that you understood that you had got rid of Mr. Clements in every respect? A. Yes. Q. Now, did you mean that as to your business matters and as to your social matters?"

When the question last quoted was propounded to the witness, defendants' counsel objected, and the objection appeared in the deposition in these words:

"Objected to as repetition; and, second, it is offered to get the witness to contradict her own evidence, and is a leading question."

When reading this deposition to the jury, defendants' counsel withdrew the objection, and proposed to read the answer, "for all purposes," to the last question, whereupon the court, against the protest of defendants' counsel, allowed the question to be withdrawn, and, of course, excluded the answer. These rulings are assigned as error.

As an abstract proposition, we are not satisfied that the court below was right; for it would seem that, if counsel making the objection chose to withdraw it, they should be entitled to the benefit of the answer to the question. If the witness had been examined in court, and defendants' counsel had interposed the same objection

to this same question, and had then withdrawn such objection, and the question had been answered, it would have been beyond the power of plaintiff's counsel to withdraw the question, and thus deprive defendants of the benefit of the answer. Although the case is not directly in point, see *Watson v. St. Paul City Ry. Co.*, 76 Minn. 358, 79 N. W. 308. But, if there was error in these rulings, it was entirely without prejudice, because Mrs. Greenleaf had already testified that she understood from what Todd said that he had gotten rid of Clements "for all purposes," and had separated from him "in every way." The question and the answer were mere repetitions.

6. We have considered much of the evidence discussed under assignments of error from 118 to 121, inclusive, and do not care to repeat. These assignments simply involve the finding that the co-partnership was not dissolved in October, 1894. But we will at this time briefly allude to the contention of counsel, made in this connection, that because Mrs. Greenleaf, one member of the original firm, knew nothing of the arrangement between Clements and Todd under which the notice of dissolution was signed, the subsequent receipts executed, and other steps taken to conceal the real facts, and because she supposed that Clements was no longer a member of the firm, that, as a matter of law, he could not be, and was not, such member, and that at most there was nothing more than what is termed a "subpartnership" between Clements and Todd after the pretended dissolution.

From an examination of Mrs. Greenleaf's evidence, it conclusively appears that she placed implicit confidence in Todd, and left to his management and control her interests in the concern. He acted for her in everything that was done, and she knew nothing of the business transactions. She signed upon his request, and without examination, all papers laid before her. She stated that she never talked with Clements about a dissolution, knew nothing of it at the time it is alleged to have taken place, and positively denied that she signed the notice thereof, in which her name appeared with the names of Clements and Todd. Under these circumstances, there is no merit in the position taken by counsel. It is plain that Clements continued to be a partner, as to Mrs. Greenleaf, if at any

time after October 19, 1894, he occupied a partnership relation of any kind towards or with his previous associates.

7. We do not deem it necessary to discuss other assignments of error. In our opinion, they are devoid of merit.

The judgment is affirmed.

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STATE v. GEORGE ZENO.

February 5, 1900.

Nos. 11,812—(21).

**Occupation of Barber—Regulation by State.**

It is competent for the legislature of this state, in the interests of the public health and welfare, to enact laws for the purpose of regulating and throwing restrictions around the occupation or calling of barbers.

**Certificate—Laws 1897, c. 186, Constitutional.**

Laws 1897, c. 186, in so far as it prohibits any person from following the occupation of a barber in this state without first obtaining a certificate of registration as therein required, is valid, and not in violation of the constitution.

Defendant was convicted in the municipal court of Minneapolis for violation of Laws 1897, c. 186, being "An act to regulate the practice of barbering," etc.; and appealed from an order, Holt, J., denying a motion for a new trial. Affirmed.

*Albert H. Hall* and *C. J. Cahaley*, for appellant.

The act is vicious in the extreme, since its evident purpose is the legalizing of a trade union or trust; and its offensive paternalism is in contravention of constitutional limitations. *Matter of Jacobs*, 98 N. Y. 98, 115. The act cannot be justified as an exercise of police power. *Austin v. Murray*, 16 Pick. 121; *Inhabitants v. Mayo*, 109 Mass. 315; *Slaughter House Cases*, 16 Wall. 36; *Coe v. Schultz*, 47 Barb. 64; *Matter of Jacobs*, supra; *State v. Donaldson*, 41 Minn. 74, 82. It is unconstitutional, since it deprives defendant of life, liberty, and property, without due process of law. *People v. Girard*, 73 Hun, 457; *People v. Marx*, 99 N. Y. 377; *Butchers Union S. H. & L.*

*S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746; *Live Stock Assn. v. Crescent City Co.*, 1 Abb. (U. S.) 388, 398; *Matter of Jacobs*, supra; *Wynehamer v. People*, 13 N. Y. 378, 398; *People v. Otis*, 90 N. Y. 48. It is unjust and unreasonable, since it discriminates between persons of the same class. The act has legislated defendant out of his right to be a barber, since he cannot qualify under the act, and the board of examiners are powerless to issue him a certificate.

*Frank Healy and H. D. Dickinson*, for respondent.

The occupation of a barber is properly a subject of police regulation. The exercise of this calling concerns the public health and safety. *Munn v. Illinois*, 94 U. S. 113. The act is on a line with laws relating to the practice of medicine and dentistry. *Dent v. West Virginia*, 129 U. S. 114; *Singer v. State*, 72 Md. 464; *State v. Call*, 121 N. C. 643; *France v. State*, 57 Oh. St. 1; *State v. State Med. Exam. Board*, 32 Minn. 324; *State v. State Board Med. Exam.*, 34 Minn. 387; *State v. Fleischer*, 41 Minn. 69; *People v. Phippin*, 70 Mich. 6; *State v. Carey*, 4 Wash. 424. It does not interfere with the right to labor more than do those laws which regulate plumbers. Yet such are held constitutional. *State v. Gardner*, 58 Oh. St. 599; *People v. Warden*, 144 N. Y. 529. Laws prohibiting barber shops being kept open on Sunday are held valid on sanitary grounds. *State v. Petit*, 74 Minn. 376; *People v. Havnor*, 149 N. Y. 195; *People v. Bellet*, 99 Mich. 151.

The constitutional provision against class legislation does not relate to legislation which, in carrying out a public purpose, is limited in its operation. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Powell v. Pennsylvania*, 127 U. S. 678; *Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. 679; *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222; *State v. Sheriff Ramsey Co.*, 48 Minn. 236; *State v. Chapel*, 64 Minn. 130; *Lommen v. Minneapolis G. L. Co.*, 65 Minn. 196. Defendant has not been legislated out of his right to be a barber. The courts will not put so harsh a construction upon the intention of the legislature, unless such construction is unavoidable. Every presumption favors the validity of the law. All doubts must be resolved in favor of its constitu-

tionality. *Sykes v. Mayor*, 55 Miss. 115, 143; *Com. v. Butler*, 99 Pa. St. 535; *Wilkins v. State*, 113 Ind. 514; *Central v. Board*, 67 Iowa, 199; *State v. Moore*, 104 N. C. 714; *Fletcher v. Peck*, 6 Cranch, 87, 128.

**BROWN, J.**

Defendant was convicted in the municipal court of the city of Minneapolis of a violation of Laws 1897, c. 186, and appeals from an order denying his motion for a new trial.

Defendant is a barber, and has followed that occupation since 1880,—most of the time in this state. At the time of the violation of the law in question he was located and engaged in such calling at the city of Minneapolis. On April 1, 1899, he performed certain acts within his calling upon the persons of John Madden and Rudolph Scholl, without first having obtained a license as required by such law; and for this he was convicted, and sentenced to pay a fine. There is no controversy about the facts. Defendant violated the law by continuing in his occupation without a license, and was properly convicted, unless it be held that the law is unconstitutional and void. The sections of the law applicable to this case are as follows:

“Section 1. It shall be unlawful for any person to follow the occupation of barber in this state unless he shall have first obtained a certificate of registration as provided in this act; provided, however, that nothing in this act contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided.”

Sections 2, et seq., provide for a board of examiners, and prescribe their duties. Section 7 provides that persons engaged in the occupation of barbers in this state at the time of the approval of the act shall be entitled to license certificates upon the payment of a fee of one dollar, and filing with the secretary of the board an affidavit of residence, etc.

“Sec. 8. Any person desiring to obtain a certificate of registration under this act shall make application to said board therefor and shall pay to the treasurer of said board an examination fee of five dollars, and shall present himself at the next regular meeting of the board for the examination of applicants, whereupon said board

shall proceed to examine such person, and being satisfied that he is above the age of nineteen (19) years, of good moral character, free from contagious or infectious diseases, has either (a) studied the trade for three (3) years as an apprentice under a qualified and practicing barber, or (b) studied the trade for at least three (3) years in a properly appointed and conducted barber school under the instructions of a competent barber, or (c) practiced the trade in another state for at least three (3) years, and is possessed of the requisite skill in said trade to properly perform all the duties thereof, including his ability in the preparation of the tools, shaving, hair-cutting and all the duties and services incident thereto, and is possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade; his name shall be entered by the board in the register hereafter provided for, and a certificate of registration shall be issued to him. \* \* \*

"Sec. 14. Any person practicing the occupation of barber without having obtained a certificate of registration, as provided by this act, \* \* \* is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine," etc.

The question as to the constitutionality of this statute is the only one involved in the case. Counsel for defendant assail the statute from all directions, and urge its invalidity on several grounds, but we need consider the points made by them only so far as they are pertinent to the statute as applied to this particular case. We will not stop to inquire whether it would be within the power of the legislature to limit the number of apprentices a barber should be permitted to have at one and the same time. Such question has no bearing upon the one now before us. It will be time enough to consider and determine it when it is presented in some case where that particular violation is complained of. The question in this case is, is it competent for the legislature to prohibit persons from practicing the calling of a barber without first obtaining a license or certificate of registration?

Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the state, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such

laws is called in question is no longer the power or authority of the legislature to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public health and interests. A person engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents, and others inimical to the public good. It is unnecessary to discuss the grounds upon which such laws are upheld, or the objections urged against them. Counsel for defendant ably present their side of the question, but the authorities are all against them. We cite, as pertinent to the question, *State v. State Med. Exam. Board*, 32 Minn. 324, 20 N. W. 238; *State v. Board Med. Exam.*, 34 Minn. 387, 26 N. W. 123; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *People v. Warden*, 144 N. Y. 529, 39 N. E. 686; *Singer v. State*, 72 Md. 464, 19 Atl. 1044; *Dent v. West Virginia*, 129 U. S. 114, 121, 9 Sup. Ct. 231.

Is the occupation of a barber a calling or trade involving to any degree the public health and public good? If it is, the law must be sustained. We hold that it is, and that the health of the citizen, and protection from diseases spread from barber shops conducted by unclean and incompetent barbers, fully justify the law. It is a fact of which we must take notice that the people of today come in contact with, and engage the services of, those following the occupation of barber, as much as, if not more than, any other occupation or profession. We must take notice of the fact, too, that the interests of the public health require and demand that persons following that occupation be reasonably familiar with, and favorably inclined towards, ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops, caused, no doubt, by uncleanness or the incompetency of barbers. We must take notice of the fact that to attain proficiency and competency as a barber requires training, study, and experience,—training in the art, and study and experience in the management and conduct of the calling. A design and purpose to protect the public from injurious results

likely to follow from such conditions is the foundation of statutes like this. And, as we must take judicial notice of the foregoing facts, the foundation for this law is apparent. And it may be said, further, that there is as much reason for a law of this kind as to barbers as there is for such a law as to dentists, pharmacists, lawyers, and plumbers. It is enacted in the interests of the public health and welfare, and we sustain it.

The contention of appellant that if the law is sustained he will be unable to continue in his business, because he cannot now obtain a license, is not sound. He was a barber engaged in the occupation at the time of the approval of the law, but he failed to make application for a license under the terms of section 7, above quoted, within 90 days, or at all; and his contention is that, because he does not come within either of the three classes of applicants specified in section 8, he cannot obtain a license at all. This statute, like all statutes enacted in the interests of the public welfare, is entitled to a broad and liberal construction, and one that will give force and effect to the intention of the law-making power. Applying such a construction, we hold that a person who has followed the occupation of a barber for three years in this state, and is otherwise possessed of the necessary qualifications, is entitled to a certificate of registration, the same as a person coming into the state from another state. There was no intention to discriminate against barbers of this state and in favor of those residing in other states, and a construction of the law which would result in such discrimination cannot be permitted.

This disposes of all questions deserving special mention.

Order affirmed.



## JAMES S. O'BRIEN v. L. L. MANWARING.

February 5, 1900.

Nos. 11,877—(200).

79	86
80	86
79	86
182	534

**Res Judicata—Issue Decided in Former Action.**

Where, in a civil action, a material fact, which is decisive of the cause, is tendered as an issue, and not withdrawn, a determination adversely to the party tendering such issue is conclusive against him in a subsequent proceeding involving the same fact, whether he introduced evidence to support such issue or not, and even though other questions were litigated in the former suit.

Action in the district court for Washington county against defendant as assignee of Patrick McLaughlin and Patrick Kilty, and McLaughlin & Kilty, to recover \$12,500 paid to defendant. At the trial defendant objected to any testimony being received on the grounds: (1) That the issue should have been made in a former action; and (2) that the complaint did not state facts sufficient to constitute a cause of action. The court, Williston, J., sustained the objection, and directed the action to be dismissed. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*J. N. Castle*, for appellant.

*McLaughlin & Boyesen*, for respondent.

**LOVELY, J.**

The plaintiff brings this action to recover a sum of money which he claims should be returned to him by the assignee of an insolvent estate, who has received the same, but, as is claimed, in equity and good conscience should be repaid.

Manwaring, the assignee of McLaughlin & Kilty, in a former action considered by this court (75 Minn. 542, 78 N. W. 1) recovered of this plaintiff the possession of a stock of boots and shoes transferred to him before assignment by the insolvents. The recovery, upon the issues in that case, may have been accorded by the jury under the instructions of the court, for the reason that the sale from McLaughlin & Kilty to O'Brien, the plaintiff, was fraudulent, or because of his want of care in ascertaining the previous condition of

the insolvents; and he now brings this suit upon the theory that he bought the stock of merchandise in good faith, and that the defendant assignee, having received the goods, should not have them, and the money paid for them also, which it is alleged had been turned over by the insolvents to the assignee. This last allegation is contested by the assignee, but was not in this action determined by the court below, who held that upon the issues in the former action, fully pleaded in this, the supposed grievance of plaintiff had been fully determined, and became *res judicata* upon the very claim which plaintiff seeks to establish in this suit.

It may be conceded for the purposes of this review that appellant's complaint sets forth a cause of action which would entitle him to recover from the assignee the money which he paid for the stock of goods in question. But it also appears from the answer in the former action, duly pleaded in this, that the good faith of this very payment was an issue duly tendered by this plaintiff, which was or might have been litigated in that action. Paragraph 11 of the answer in the former suit makes reference to this issue in the following words:

"That the transaction between this defendant [plaintiff here] and said McLaughlin & Kilty was a cash one, and the purchase price was paid at the time of said purchase in the usual way by the check, \* \* \* which said check was fully paid, \* \* \* which fact the plaintiff [respondent here] \* \* \* well knew, \* \* \* [and] that said sum, to wit, \$12,500, was duly turned over and delivered to plaintiff herein."

That this was a part of the answer in the first suit, and that issue was joined upon it, followed by judgment, was admitted before the trial court and conceded upon this appeal. In our view, these concessions conclude the appellant, and forbid further litigation of the rights of the parties concerning the subject. Whether the appellant introduced any evidence to support this allegation on the former trial, which he denies, is immaterial. He might have done so, and is concluded by the result as effectively as if he had. *Thompson v. Myrick*, 24 Minn. 4; *Long v. Webb*, Id. 380; *Geiser T. M. Co. v. Farmer*, 27 Minn. 428, 8 N. W. 141; *Drea v. Cariveau*, 28 Minn. 280, 9 N. W. 802; *Goldschmidt v. County of*

Nobles, 37 Minn. 49, 33 N. W. 544; Pierro v. St. Paul & N. P. Ry. Co., 39 Minn. 451, 40 N. W. 520; Ebert v. Long, 43 Minn. 235, 45 N. W. 226. The issue thus tendered in the former action involving the payment of this money in good faith by appellant, and received by assignee, is not only the identical cause of action set up for recovery in the complaint in this suit, but it was a material issue therein, and of itself decisive of the case, for the assignee could not keep the money, as alleged in the answer in the former case, without affirming the sale. In other words, if what was alleged was established in the first case, it was a complete defense independent of any other question therein. Hathaway v. Brown, 22 Minn. 214. Such issue was not withdrawn. Hence in the former decision it must have been determined adversely to the appellant here, and all controversy upon it is closed by the former decision.

The order of the district court dismissing the cause is affirmed.

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JOHN ANDERSON and Others v. CITY OF ST. CLOUD.

February 5, 1900.

Nos. 11,929—(214).

**Municipal Corporation—Strength of Bridge.**

In maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated.

**Same—Question for Jury.**

After the construction of the bridge, the question whether it has been maintained in a suitable condition for public use is ordinarily, and in this case was, a question for the determination of a jury upon the evidence.

**Evidence—Contributory Negligence.**

The evidence in this case considered, and *held* to disclose such an obvious want of care on the part of the parties who sustained the injury in the use of the bridge, whereby they suffered their loss, that they cannot recover.

79	88
f84	275
79	88
e86	128

Action in the district court for Stearns county to recover \$840, damages for injuries to a block of granite and a wagon caused by a defective bridge. The case was tried before Searle, J., who directed a verdict in favor of defendant. From an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

*Calhoun & Bennett*, for appellants.

Defendant having built a bridge designed to carry a load of 15 tons, using only 25 per cent. of its real strength, was bound to keep it in such repair as to accommodate travel of that kind;—at least to accommodate such use as might probably be made of it, and cannot escape liability by showing that the load was larger than the usual loads hauled across it. Having built a bridge of that character, it amounted to an invitation to the public to use it as a 15-ton bridge. Where a bridge is originally built strong enough to support a designated weight, it must not be weakened so as to destroy its capacity to carry such a load by changes or repairs. *Fulton v. Township*, 52 Mich. 146; *Sewell v. City*, 75 N. Y. 45; *Gregory v. Inhabitants*, 80 Mass. 242; *Stebbins v. Township*, 60 Mich. 214; *Yordy v. Marshall*, 80 Iowa, 405; *McCormick v. Township*, 112 Pa. St. 185, 196; *Bonebrake v. Board*, 141 Ind. 62; *City v. Carver* (Ind.) 26 N. E. 42. Plaintiffs were not, as matter of law, guilty of contributory negligence. *Apple v. Board*, 127 Ind. 553; *Board v. Creviston*, 133 Ind. 39; *Fisher v. Village*, 133 N. Y. 527; *Board v. Legg*, 110 Ind. 479; *Walker v. Decatur*, 67 Iowa, 307.

*George W. Stewart*, for respondent.

At common law no obligation rests on municipalities to keep bridges in repair. Such obligation exists only by virtue of legislative enactment. No such liability is imposed on defendant. Sp. Laws 1889, c. 6, § 1. The city owed the public no duty except to keep this bridge in condition to accommodate ordinary traffic, and such as the city might reasonably foresee would pass over it. *Wilson v. Town*, 47 Conn. 59; *Gregory v. Inhabitants*, 80 Mass. 242; *Board v. Creviston*, 133 Ind. 39; *Yordy v. Marshall*, 80 Iowa, 405; *Moore v. Township*, 118 Mich. 425, 76 N. W. 977. The foregoing are all cases in which it was held that the question as to

whether the load was unusual or extraordinary was for the jury. In the following cases it was determined as a matter of law by the court: *McCormick v. Township*, 112 Pa. St. 185; *Clulow v. McClelland*, 151 Pa. St. 583; *Board v. Chipps*, 131 Ind. 56; *City v. Carver (Ind.)* 26 N. E. 42. Plaintiffs were guilty of contributory negligence. *City v. Carver*, *supra*. Plaintiffs assumed the risk of injury from hauling this load over the bridge.

LOVELY, J.

Plaintiffs had occasion to move a large granite block, weighing about nine tons, from their quarry, near the city of St. Cloud, to the Northern Pacific depot on the opposite side of the river. The city had built a steel truss bridge across the river two years before, with an estimated power, at the time, of sustaining burdens of 15 tons weight. This structure connected the two opposite river termini of St. Germain street, one of the public thoroughfares of the city, in a continuous way for travel; was generally used; and under its charter the municipality were required to and assumed the duty of maintaining it in a suitable condition for use by pedestrians, teams, and an electric street-car line. The bridge was 680-odd feet in length, had a 24-foot roadway between the sidewalks, and the north portion was occupied by the tracks of the street-car company, leaving a sufficient space, however, for carriages and teams to pass each other in the clear, and there was nothing to prevent the use of the portion on which the car tracks were situated for the same purpose, if occasion required. At the time in question the flooring of the bridge, which was of wood, had become worn down by use from its original thickness of four inches to an inch and three-quarters, and was water-soaked on top, though perfectly sound for an inch and a quarter below the surface. Notice of this condition had been conveyed to the city, and it does not appear that any repairs had been made since the bridge was built.

There was also a wagon bridge over the river at another point in the city, as well as a railroad bridge of the Great Northern Company, on which plaintiffs could have transferred their granite block to the depot of the Northern Pacific Company by payment of switching charges, but the persons to whom it had been sold

desired to have it delivered at the depot of the latter company by team, and the plaintiffs placed it upon a heavy truck, and with several teams of horses undertook to haul it over the wagon way of the St. Germain Street bridge. When they reached a point one-third of the way from the opposite side, the wheels on one side of the truck broke through the plank flooring, the stone slipped from its place, and fell upon the river bank below, considerably damaging the bridge, and practically ruining the stone, for which injury plaintiffs seek in this action to recover compensation from the city for alleged neglect to maintain a reasonably safe highway for their use, in the manner adopted by them.

At the trial, upon the conclusion of the evidence, the court ordered a verdict in favor of defendant. Plaintiffs moved for a new trial, which was denied, and now by appeal from that order bring the whole record into this court for review.

On the trial it was stipulated by the parties

“That the load in question was a larger and heavier load than the usual and ordinary loads that were hauled across the bridge,”

And it is very earnestly urged by defendant's counsel on this appeal that this concession of itself precluded a submission of the question to the jury upon the duty of the city to maintain a reasonably safe bridge. To this view we cannot assent. The stipulation, so far as the plaintiffs are concerned, only admits that the load was larger and heavier than the ordinary loads hauled across the bridge, so that if defendant's claim in this respect is sound, it would, at least within its original strength capacity, become at the trial a mere method of mathematical estimation of the weight of loads which had been previously hauled over the structure, above the weight of which no one could trust it without peril, or be under legal protection. This is not the rule supported either by reason or authority. The true rule of duty resting upon public authorities in such cases has been held by the supreme court of Massachusetts to be to maintain them

“In such condition that, having in view the common and ordinary occasions for their use, and what may fairly be required for the

proper accommodation of the public at large in the various occupations which may from time to time be pursued, each particular way shall be so wrought, prepared and maintained that it may justly be considered, for all the uses and purposes for which it was laid out and designed, to be reasonably safe and convenient." *Gregory v. Inhabitants*, 14 Gray, 242, 246.

In this abstract statement of the rule of duty we concur, and within the original strength capacity of the structure the city was required to maintain the bridge in question in a reasonably safe condition, not only for that traffic for which it had been used, but also for such uses as it might reasonably anticipate it would be used by the "public at large in the various occupations which may from time to time be pursued" by those having lawful occasion to use it; and it necessarily follows from this rule that it is not a question of law, depending entirely upon the past use of the structure, but an issue for a jury to determine, whether the bridge, upon evidence showing its age, use, structural conditions, strength, or weakness of its different parts, the business uses of the surrounding locality, as well as the previous use made of the same, has been lawfully maintained in any particular case. The rule requiring a submission to a jury of the issue upon the duty of the city to the public in such a case as this is fairly inferable from the best authorities cited by both parties on this appeal. *Gregory v. Inhabitants*, *supra*; *Wilson v. Town*, 47 Conn. 59; *Moore v. Township*, 118 Mich. 425, 76 N. W. 977; *Board v. Creviston*, 133 Ind. 39, 32 N. E. 735; *Yordy v. Marshall*, 80 Iowa, 405, 45 N. W. 1042; *Fulton v. Township*, 52 Mich. 146, 17 N. W. 733; *Sewell v. City*, 75 N. Y. 45; *Stebbins v. Township*, 60 Mich. 214, 26 N. W. 885; *McCormick v. Township*, 112 Pa. St. 185, 196, 4 Atl. 164.

But the order of the court below directing a verdict was right, and must be sustained, for the reason that it clearly appears upon the whole evidence that plaintiffs displayed such a want of the ordinary care required under the circumstances of this case as to justly preclude them from recovery against the city; and, as we view the evidence, it would have been the duty of the trial court as a matter of law to have set aside any verdict that might have been rendered in their favor, upon the ground that their misfor-

tune was the result of their own negligence and not directly chargeable to any lack of duty by the city.

We need only summarize a portion of the undisputed facts which force this conclusion upon us. It is apparent that, to careful observation, the flooring of the bridge was worn too thin (less than half its original thickness) to sustain the heavy load in question, while the stone was two-thirds in weight of the original strength capacity of the structure, and the danger of using the bridge for hauling such a heavy load over it was brought directly to the attention of plaintiffs, who investigated its capacity in that respect before using it, and, under such circumstances, should be charged with the full knowledge of what their examination would disclose at the time when they drove their teams upon it. After going upon the bridge, their teamsters had proceeded only 25 feet when the planking commenced to crack or break under the burden. Without turning to the other side, where the flooring was stronger, or attempting to withdraw the load, which seems possible, the teamsters "kept right on," as their witness puts it, for over 400 feet, the flooring in the meantime cracking, and as one witness, who is uncontradicted, says, breaking through, until one-third only of the bridge remained to be traversed, when the catastrophe, which seemingly ought to have been expected, occurred.

Under the facts above stated, which are not denied, it would seem that the appellants should, when their suspicions were aroused regarding the strength of the bridge, and they made inquiries to satisfy themselves whether it was safe, be held at least to knowledge of the results which a reasonable examination would have shown, viz., that the same was unsafe (*City v. Carver* [Ind. Sup.] 26 N. E. 42); and that their temerity in keeping "right on" after the flooring commenced to crack and break, without an effort either to turn to the stronger and safer portion of the bridge or to withdraw their load, committed them to an experiment in which they took chances that were decidedly against them. Under these circumstances we cannot hold that the city is legally responsible for the result, which might have been obviously expected and avoided by reasonable care.



The direction to find for the defendant city was therefore justified upon the whole evidence, and the order appealed from is affirmed.

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STATE v. LYMAN E. COWDERY and Another.

February 6, 1900.

Nos. 11,826—(20).

**Grain—Warehouse Receipt—Authority to Sell.**

A provision in a storage receipt, issued under G. S. 1894, § 7646, that the stored property may be mingled with other property of the same kind, or transferred to other elevators or warehouses, does not confer authority on the warehouseman to sell the property described therein.

**Same—Bailment.**

Under such a receipt, when it in other respects conforms to the provisions of section 7646, the contract is a bailment, and not a sale.

**Flax.**

Flax is included within the meaning and intent of G. S. 1894, § 7645, et seq., and is subject to the protection of the warehouse law.

**Evidence.**

The evidence in this case does not show beyond a reasonable doubt that there was an intent to defraud the prosecutor, which is an essential ingredient of the offense charged, and the conviction is therefore set aside.

Lyman E. Cowdery and Jared G. Wheeler were indicted in the district court for Dodge county for grand larceny in the first degree. Defendants having demanded separate trials, defendant Cowdery was tried before Buckham, J., and a jury, which rendered a verdict of guilty. From an order denying a motion for a new trial, defendant Cowdery appealed. Reversed.

*Childs, Edgerton & Wickwire*, for appellant.

The tickets issued by the firm were contracts of sale, and not of bailment. If the relation of bailor and bailee existed, it was by virtue of the statute, for at common law the transaction was not

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88	501

one of bailment, but one of sale; inasmuch as the grain was intermingled with other grain of like grade and removed to other elevators that Cowdery and Wheeler selected. The statute does not attempt to make such transaction a bailment, where an express contract is made authorizing the intermingling and removal of the grain. The statute was only designed to make the transaction a bailment where there was no contract right to intermingle and remove grain. *Rahilly v. Wilson*, 3 Dill. 420; *McCabe v. McKinstry*, 5 Dill. 509; *Powder Co. v. Burkhardt*, 97 U. S. 110; *Chase v. Washburn*, 1 Oh. St. 244; *South Australian v. Randell*, 3 Priv. Coun. 101; *Lonergan v. Stewart*, 55 Ill. 44; *State v. Rieger*, 59 Minn. 151; 22 Alb. L. J. 358; *Murray v. Pillsbury*, 59 Minn. 85; *Weiland v. Sunwall*, 63 Minn. 320; *Smith v. Clark*, 21 Wend. 83; *Dykens v. Allen*, 7 Hill, 497; *Hurd v. West*, 7 Cow. 752, and note 756; 2 Kent, Com. 589, and note; *State v. Stockman*, 30 Ore. 36; *Fishback v. Van Dusen & Co.*, 33 Minn. 111, 123; *O'Dell v. Leyda*, 46 Oh. St. 244.

It is the settled doctrine of the supreme court of Illinois that such a transaction is a sale and not a bailment. *Richardson v. Olmstead*, 74 Ill. 213; *Lonergan v. Stewart*, *supra*; *Cloke v. Shafroth*, 137 Ill. 393. See also *Ardinger v. Wright*, 38 Ill. App. 98.

The state failed to establish any criminal intent on the part of Cowdery to defraud Bradshaw or any one else. *State v. Connelly*, 57 Minn. 482, 486; *State v. Johnson*, 77 Minn. 267; *Messenger v. St. Paul City Ry. Co.*, 77 Minn. 34; *Brennan L. Co. v. Great N. Ry. Co.*, 77 Minn. 360. The contention that defendants held the property as bailees, based on G. S. 1894, § 7645, is not well founded, because flax is a plant and is not embraced within the term "grain."

*W. B. Douglas*, Attorney General, and *C. W. Somerby*, Assistant Attorney General, for respondent.

LOVELY, J.

Defendant, who was jointly indicted with another person, was convicted of the crime of larceny, as bailee, in fraudulently appropriating a quantity of flax to his own use, with intent, as charged in the indictment, to deprive the owner thereof of his property, under the provisions of G. S. 1894, § 6709, subd. 2.

Lyman E. Cowdery was a warehouseman, and, with his partner,

was running an elevator at Kasson, where he received, from time to time, quantities of flax from the prosecuting witness, Bradshaw, aggregating in amount 760 bushels, and evidenced by nine receipts or tickets, which were given to the owner of the flax, and which the prosecution insist constituted the relation of bailor and bailee between the parties thereto, under the warehouse laws of this state. G. S. 1894, § 7645, et seq. The warehousemen became insolvent, made an assignment, and were unable either to furnish the flax or put up the equivalent in money.

The defendant insists that the tickets or storage receipts did not create the relation of bailment between defendant (who was tried alone) and the owner of the flax, but by the terms of such receipts constituted a sale thereof to the defendant and his partner, or, at least, authority to part with the flax; that the warehouse law, under which such contract of bailment must be established, does not apply to flax; also that, by reason of the previous business relations and conduct of the owner of the property stored with the defendant, the latter was led to believe that he was authorized to deal with the flax without reference to the terms of the receipts; from which, as defendant claims, it follows that there was no proof of the necessary intent to defraud, which is alleged in the indictment and is an essential element of the statute, and must therefore be proved.

The warehouse receipts referred to contain the requisites of G. S. 1894, § 7646, in all respects. They, "in clear terms, state the amount, kind, and grade" of the flax stored, and "the terms of storage," and, in addition, the following provision, which embraces the pith of the contention upon the construction of the storage receipt, viz.:

"Express authority is given, by acceptance hereof, that said grain or seed may be mingled with grain or seed of other persons, and shipped or removed to any other elevator we may select."

And it is urged that these provisions, which authorize a removal of the flax, etc., take this case out of the provisions of the Penal Code.

It is urged, in support of this claim, that an interpretation of the

warehouse statutes should be made that does not conflict with the generally settled rules of the common law, and that the particular provision of these contracts quoted above is inconsistent with the theory of a bailment.

While it is unquestionably true that the commingling of the property of one person with the property of another, with the consent of the owners, so as to destroy the specific identity of each, conclusively negatives the relation of bailor and bailee upon common-law rules, it must be remembered that it was the object of the statute to provide a remedy for the protection of the agricultural producers of this state which they did not have before, and, if the purpose and practical means by which such protection is afforded is to be found clearly expressed in the statute, it necessarily must be the statute, instead of the common law, that we are to interpret. It is our duty to discover the true legislative intent expressed by the statute, for, within constitutional limitations, that is always the real test in such cases. We cannot allow a repeal or modification of a statute by the law which the statute itself seeks to change; this is self-evident. Neither can we abridge the effectiveness of a wholesome statute by judicial construction or finesse. The very nature of the business that has long been conducted in this state by the owners of elevators and warehouses in dealing with the agricultural producers would lead to the inference that the provisions of the statute referred to were intended to create on the part of the warehousemen an obligation to have the owner's property or its equivalent ready for delivery when called for. The receipt, according to the statute, must be in writing, and it must state amount and grade of grain, charges for storage, and advances paid, which receipt shall be prima facie evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt, and penal provisions follow against false statements, etc. The suggestion arises, why should this contract be in writing? why so explicit? and why, upon its face, should evidence of its present money value be required, unless it was intended to be evidence of title and to become negotiable? And it follows that, if the title of the property is to remain in the owner, by necessary implication,

the contract, while not a common-law bailment, becomes vested with the characteristics of that trust relation, and is a bailment under the statute.

We do not think that the acts of mingling produce of one person with that of another, or the removal of such property from one elevator to another, are in necessary conflict with this view. These acts are essential in the conduct of the elevator and warehouse business. It must be mingled with other produce, if it is taken in store, or there would have to be a warehouse for every patron; and, in facilitating the business in question, it likewise may be necessary to remove the property stored from one depository to another, to accomplish practical ends. The earnestness of the able counsel for defendant in presenting their views upon this point has led to the consideration of these views, rather than any serious doubt upon the question itself; for we think the contention now urged has been anticipated and specifically provided against by the warehouse law itself. G. S. 1894, § 7645,—the preceding section to the one last referred to,—provides, *inter alia*,

“That whenever any grain shall be delivered for storage to any person, \* \* \* such delivery shall in all things be deemed and treated as a bailment, and not as a sale, of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, and notwithstanding such grain may be shipped or removed from the warehouse \* \* \* where the same was stored,” etc.

While this language remains in the statute, it is difficult to see how there can be room for interpretation, for the language of the receipts in this case is almost identical with the provisions which the statute declares shall not affect the liability of the warehouseman as bailee, and that this court has so understood its effect is clear from its decision in *State v. Barry*, 77 Minn. 128, 79 N. W. 656. Upon the receipts themselves we think it is clear that defendant was a bailee, and amenable to the law under which he was indicted.

Again, it is urged for defendant that the warehouse acts do not provide for storage of flax, which is not included in any proper definition of the word “grain.” The distinctive word of the statute is “grain,” and “flax” is not specifically referred to by that name.

and it, of course, becomes a question whether the storage of flax was within the legislative intent when these acts were passed. An imposing array of dictionaries and encyclopedias was produced on the argument to show that grain is a berry and flax a fiber. But this is a question of reasonable construction of a statute, rather than a scientific analysis, which must yield to the popular understanding that ought to prevail in such cases. Courts appeal to dictionaries in questions of doubt in science, and perhaps in search of evidence of popular understanding, when in doubt. But where, within the knowledge of the court, the dictionary conflicts with popular understanding, the latter will be adopted, although it may require a subsequent enlargement of the definitions of the lexicographer, which is continually necessary, since the dictionary is an evidence, rather than an originator, of definitions.

We have no doubt whatever from the custom at the time these statutes were enacted that they were supposed to apply to flax. It would startle the legislature that enacted them, or the legislatures that have convened since without recognizing the necessity of amending them, as well as the farmers of this state, who have continuously, since the law was passed, accepted receipts for deposits of flax, to tell them that in that respect it was not the intention of the lawmakers to protect them as well as the growers of wheat and barley. We think it would likewise startle the warehousemen themselves to construe such a distinction into the law. The defendant evidently saw no difference at the time of the issuance of his receipts to Bradshaw, for the words "grain" and "flax" are used convertibly in such receipts, and we judge from the record that his able counsel did not urge this view during the trial, or adopt it until after their briefs in this court had been printed. While in criminal cases, under the harsh penal statutes that once governed in England, nice and technical constructions upon indictments and statutes were adopted in favorem vitæ, a more liberal rule has since prevailed, more consistent with common sense, and we shall adopt in this case the construction which protects the numerous bailors of flax in this state, which we have no doubt was within the legislative, as well as the popular, mind when these laws were enacted.

The remaining assignments of error, with the exception of one, relate to alleged errors that are not likely to occur again, and, in view of the disposition we shall make of this case, need not be considered.

The evidence of defendant's intent to defraud in this record is solely the presumption arising from his inability to turn over to the prosecutor the flax stored upon demand, and it seems doubtful if the complaining witness intended a criminal prosecution until many months afterwards, when such demand, which seems to have been merely formal, without expectation that it would be complied with, was made. It is true that this proof of demand and refusal raises a presumption of guilt, and makes a prima facie case against defendant, but this presumption is so overcome by opposite inferences, from admitted and undisputed facts, that we cannot permit the verdict to rest upon it alone.

We do not find in this record any of the indicia of crime usual in similar prosecutions. The defendant had made no preparations for business collapse. He had run his affairs in the usual way, which had grown up, under the sanction of prosecutor and his other patrons, for many years, until, on a declining market, he found himself short, and unable to meet all his obligations. That defendant was a man of irreproachable character was established at the trial by a formidable number of witnesses, some of whom had stored produce with him, and had suffered loss, under the same circumstances as the complaining witness. Previous to the suspension of defendant's business, he and the prosecutor had conducted their business relations upon terms of unlimited confidence, for many years. The latter had stored his produce with defendant, sometimes receiving receipts and sometimes not. In all such cases it seems that such deposits were treated by defendant as if he had authority to dispose of them according to his best judgment, with the sanction of the prosecutor. These and other facts disclosed by the record lead us to the conclusion that this verdict should not be allowed to stand. Our views in this respect are strengthened by a statement of the learned trial court, which expressed doubts of the justness of the result.

It is ordered that the judgment of the court below be set aside, and a new trial awarded.

JOHN JOSEPH TOBIN v. ELIZA HAACK and Another.

February 7, 1900.

Nos. 11,817—(152).

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d81	32

### **Execution of Will.**

A last will and testament, not executed in conformity with the requirements of G. S. 1894, § 4426, is invalid.

### **Same.**

A last will and testament must be signed by the testator in the presence of the subscribing witnesses, or, if not so signed, the testator must acknowledge to such witnesses that the signature thereto attached is his, or in some other way clearly and unequivocally indicate to them that the will about to be signed by them as witnesses is his last will, and has been signed by him.

### **"Attest" in G. S. 1894, § 4426.**

To "attest" the execution of a will, within the meaning of G. S. 1894, § 4426, is to witness and observe the execution and signing thereof by the testator, or to be expressly and clearly informed by the testator, before signing as witness, that he has signed and executed it.

### **Evidence.**

Evidence recited in the opinion *held* sufficient to justify a finding by the trial court that the will in question was not executed as required by statute.

John Joseph Tobin filed for allowance in the probate court for Ramsey county an instrument purporting to be the last will of Kate Ludwig, deceased. Eliza Haack and another filed objections, and from an order refusing to allow the will the proponent appealed to the district court for that county. In the district court the case was tried before O. B. Lewis, J., who found in favor of the objectors, and directed judgment affirming the order of the probate court. From a judgment entered pursuant to the findings, the proponent appealed. Affirmed.



*J. F. George*, for appellant.

*Charles N. Bell* and *Geo. E. Budd*, for respondents.

BROWN, J.

This is an appeal by J. J. Tobin from a judgment of the district court of Ramsey county affirming an order of the probate court of the same county refusing the probate of the will of Kate Ludwig, and also from an order denying his motion for a new trial.

It appears from the record that Kate Ludwig, at the time of her death, in July, 1898, was a widow without children, leaving surviving her, as next of kin, three sisters and the children of a deceased brother. She owned certain real and personal property at the time of her death, and attempted, at least, to dispose of it by her last will and testament. Some time after her death the appellant, J. J. Tobin, who is in no way related to the deceased, filed with the probate court what purports to be her last will and testament, and petitioned that it be allowed and probated. Due notice of his petition was given, and at the time set for hearing the next of kin of deceased above named appeared, and opposed the will; claiming that it had not been executed in conformity to law, and for other reasons not necessary to be stated. The probate court rejected the will, on the ground that it was not shown to have been executed in accordance with the requirements of the statute on the subject. The district court, on appeal, came to the same conclusion, and this appeal is the result.

To prove the execution of the will, appellant called one Sheire, who testified that some time in February, 1897, the deceased requested him to draw a will for her to execute; that he did so, drawing and preparing it in accordance with her directions, and delivered it to her for execution. The subscribing witnesses were then called, and testified as follows, omitting portions of the evidence not material, to wit:

Mrs. Clara Eggert: "Did you know Kate Ludwig? A. Yes, sir."  
"Q. Did she ever speak to you about making a will? A. One time she spoke to me about making a will. Q. About when was that? A. A short time before she asked us to sign the will,—asked us into her house to sign the will. A short time before that she spoke to us about making a will, and asked us if we would be willing—

my husband and I—to sign it, and I said, ‘I guess so.’ Q. To sign it as witnesses, do you mean? A. Yes, sir. Q. When did she next speak to you about it? A. The next time she spoke to us about it was the day that she came in, and said she was ready for us to sign. Q. Her will? A. I don’t remember. I can’t say positively whether she mentioned the word ‘will’ or not, but she spoke to us before about her will; yes. Q. She came in, and asked you—What did she say the second time? A. She gave me to understand that she was ready for us to sign, but whether she used the words ‘my will’ I don’t remember that, but I understood that it was her will, because before she had asked us to sign her will.” “Q. You went into her house with your husband then, did you? A. Went into her house with my husband. Q. Do you remember how you went in there? A. We went from the little hall through the parlor, into the dining room, and she had on her dining-room table a pen and ink stand, and paper covered over, as she said, her will, and she sat down to the table, took the pen and ink, and sat down to the table,” “but I couldn’t see what she was doing, whether she was writing, or what she did; I can’t say. Q. Did you see her do anything? A. I saw her hand move, but I didn’t know what she was doing. Q. Why didn’t you know? A. Well, it didn’t impress me that she was writing. Q. Where were you sitting from her? A. I was sitting— Well, just as though I sat a little further back from this gentleman, right here. Q. You sat behind her?” “You could see the pen in her hand, could you? A. I could see the pen in her hand. Q. And did you see her make any motions? A. I saw her go through motions, yes, as though she were writing, but it didn’t impress me that she was writing at the time. Q. What did she then do, if anything? A. She then got up, and handed the pen to my husband, and he sat down, and wrote his name, and then I sat down, and wrote mine beneath it.” “Q. Is the paper presented to you now, the will proposed in this case, the paper which was on the table that you refer to? A. I can’t say whether it is the paper, as I didn’t see the paper. It was all covered up, excepting the two lines, where we wrote our names. \* \* \* Q. Is that your signature on that paper?” \* \* \* “A. Yes, sir; that is my signature.” “Q. Did you observe any other writing on the paper at that time? A. No, sir; I did not; it was all covered up with a sheet of paper. \* \* \* The only thing I saw was my husband’s name. Q. There was nothing visible to you on that paper except your husband’s name? A. That was all I could see.”

Cross-examined: “Q. With the exception of your husband’s name and your own name, did you see any writing then on the paper that you and your husband signed in Mrs. Ludwig’s house? A. No, sir; none that I can think of,—none whatever. Q. Is there

any writing on the paper except what you and your husband wrote, so far as you know? A. I don't know, because it was covered up. Q. If there was any, you didn't see it? If there was any writing on the paper, except your husband's name and your name, you didn't see it? A. No, sir." "Q. Now, Mrs. Eggert, you have no interest in this one way or the other? A. None whatever." "Q. Did Mrs. Ludwig say anything to you after you got into the house? A. All she said after we had signed the will was, 'Well, you both know that I am not crazy.' That is all she said." "Q. Well, after she had finished at the table," "did she say anything to you? A. She just handed the pen to my husband." "I don't know whether she said anything. I didn't pay any particular attention to it." "Q. She made no remark whether she was signing her will? A. No, sir. Q. After she got up, didn't she say that, 'I have signed this instrument; this is my will; I want you to witness it'? A. No, sir."

Fred C. Eggert, the other subscribing witness, testified:

"Q. What did you observe when you went into the house? A. Went into the house in the hall, and the front room, through the archway, and on the dining-room table, I guess it was, I seen this instrument there,—paper, and the pen and ink. She stepped forward, picked up the pen, went across the paper, and motioned on the paper, as I understood by, to show me where to sign." "Then I stepped forward to sign my name, and then I handed the pen to my wife, and my wife signed. Q. Did she ask you there to sign? A. Not in her house; she asked that in my house." "Q. She took up the pen and motioned over the paper, and she got up, and handed you the pen, did she? A. Yes. Q. Did you see whether she was signing or writing or not? A. No. I see, as soon as I went towards the table, I see that it was blank, and covered up,—saw it was covered up, to keep it secret,—and I stepped back, and she motioned, and I stepped forward, and I signed it. Q. You thought she didn't want you to see? A. I saw it was a secret; therefore I didn't read anything; wouldn't question to sign anything, but I trusted to Mrs. Ludwig's honesty. I trusted to her honesty that that was what she wanted us to sign. Q. What was? A. The will. Q. What makes you think it was the will she wanted you to sign? A. Because she asked us previous." "Q. Did she say anything else to you about that, why she wanted you to sign a will or anything? A. Not to me. My wife,—she mentioned something to my wife, and she told me." "Q. When you came to sign, did you have to open the will to sign it? A. No, sir." "Q. Was there anything else visible there? A. No. Q. Didn't you see any writing at all? A. No, sir. Q. Upon the paper? A. No, sir. Q. Was the bracket and the word 'Witnesses' there afterwards?

A. Not to the best of my memory." "I didn't see any writing. Q. Of any kind whatever? A. No, sir. Q. Except your own signature and your wife's signature. You say that, after you and your wife got into the house there, you found the paper there on the table. Did she prepare it there before you came in, apparently? A. It was all prepared. It was that way—found it that way—when we came in. Q. And all she said to you, as I understand, while you were there in the house, was, after you had signed and your wife had signed, she then says, 'Now, you both see that I am not crazy?' A. That is all that was said." "Q. Could you see the paper all the time from the time that you went in there? A. Oh, yes; yes, sir. Q. Did you see where she put the pen on the paper? A. Not exactly. I seen about where she placed it. She motioned on that paper when we signed it." "Q. When you came into the dining room, did she sit down at the table? A. Yes, sir. Q. Did you see her take the pen in her hand? A. Yes, sir. Q. Did you see her dip it in the ink? A. No, sir. Q. You saw her take the pen in her hand? A. Yes, sir. Q. Where did you stand with reference to where she was? A. I was away probably three or four feet. Q. She was sitting at the table? A. Yes. Q. You were looking at her in a casual way, were you? A. Yes, in a way, not in an interested way. She sat down, and made a motion just a moment, and got up. Q. Do I understand you to say that in making that motion your idea was that she intended to show you where to sign? A. Yes. Q. While she was sitting there at the table? A. Yes. Q. You didn't see her signature? A. No. Q. Or write? A. No, sir. Q. Did you see her cover the paper or uncover it all? A. No, sir."

Other witnesses, familiar with the handwriting of Mrs. Ludwig, testified that the signature to the will was, in their opinion, written by her. The will leaves the entire estate of the testatrix, with the exception of a few minor bequests, to Tobin, who was in no way related to her, but had occupied a room in her house for a few years prior to her death.

The question presented to this court is whether the finding of the trial court that the will was not executed as required by law is justified by the evidence, or whether such finding is so clearly against the evidence as to justify a reversal.

The particular point made by respondents against the sufficiency of the evidence is that the subscribing witnesses to the will did not attest its execution; that they did not see the testatrix sign the same, neither did they see her signature, nor know that she had

signed it, when they attached their names; neither did she say or declare that she had signed it, or that the particular paper was her will. At the time the witnesses attached their names, the paper or will was entirely concealed from their view. It was entirely covered with another paper. Does this evidence sufficiently show an attestation by the witnesses of the execution of the will? Does it show a compliance with the statute? Our statutes on the subject of the execution of wills must be strictly pursued and complied with. *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069.

The section pertinent to the question under consideration (G. S. 1894, § 4426) is as follows:

"No will \* \* \* shall be effectual to pass any estate, real or personal, \* \* \* unless it is in writing, and signed at the end thereof by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses; \* \* \*."

A great variety of decisions are to be found in the books, both in England and in this country, construing and expounding statutes similar to this, and in one respect they are nearly uniform, and that is that the requirements of the statutes must be followed and complied with, with reasonable strictness. Any substantial departure, in the manner of the execution of the will, from the requisites laid down by the statutes, renders the will void. The proponent of a will for probate has the burden of proof to show its due execution. In this case *Tobin* presented the will for probate, and the heirs and next of kin of the testatrix opposed it. The burden was on the proponent to prove that the will was executed in accordance with the statutes. In *re Layman's Will*, 40 Minn. 371, 42 N. W. 286. There is a very marked distinction between "attesting" and "subscribing" a will. It is very clearly pointed out by *Robertson, C. J.*, in *Swift v. Wiley*, 1 B. Mon. 114, 116:

"As the statute requires two witnesses to the publication of a will disposing of real estate, the paper subscribed by the witnesses must, of course, be completed as a legal will at the time of attestation. \* \* \*

"To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different

things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication: but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation in fact, without subscription."

And we may add to this that there may be a subscription in fact without attestation. The Kentucky statute is identical with that of this state. It requires the will to be "attested and subscribed by two or more witnesses." We find the rule to be uniform, so far as our examination of the adjudged cases has extended, in all the states of this country having a statute similar to ours, and in England under the statute of frauds substantially the same, that to constitute a legal and valid attestation the testator must either sign the will in the presence of the witnesses, or acknowledge his signature to them, or in some other way clearly and unequivocally indicate to them that he has signed and executed the same. Otherwise, the witnesses attest nothing.

In this case the will was not signed in the presence of the witnesses, they did not know that it had been signed by the testatrix, nor did she indicate to them in any way that she had signed it. She kept the entire paper from their view, and they saw nothing except their own signature. On this subject, see Schouler, Wills (2d Ed.) § 330; *Swift v. Wiley*, 1 B. Mon. 114; *Reed v. Watson*, 27 Ind. 443; *Cassoday*, Wills, § 114, et seq.; *Id.* § 133, et seq.; 1 *Jarman*, Wills (6th Ed.) 113; *Chase v. Kittredge*, 11 Allen, 49; *In re Will of Mackay*, 110 N. Y. 611, 18 N. E. 433; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280; *Chisholm's Heirs v. Ben*, 7 B. Mon. 408; *Lewis v. Lewis*, 11 N. Y. 220; *Combs v. Jolly*, 3 N. J. Eq. 625; 29 *Am. & Eng. Enc.* 209, and notes.

A will is the solemn disposition of one's property, to take effect after death. We do not lose sight of the sacredness or sanctity of such an act, or of the right of the person to so dispose of his property. Such right is to be upheld, and wills properly executed will be sustained, regardless of the particular disposition of the

property of the testator. But we must not lose sight of or overlook the fact that the right to dispose of one's property in that manner is purely statutory. And, to be effectual, the statutory requirements must be complied with.

In the light of the authorities above cited, and the law as we believe it to be, we hold that the findings of the trial court are supported by the evidence, and the judgment and order appealed from are affirmed.

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**J. C. CORCORAN v. HIRAM L. SUMPTION.**

February 7, 1900.

Nos. 11,825—(156).

**Action to Dissolve Partnership—Pleading.**

When a copartnership is for a term of years, and an action is commenced by one partner against the other to dissolve the same on the ground of misconduct and misbehavior on the part of the defendant in respect to partnership matters, it is not necessary that the latter plead in his answer the commencement of such action, and that he has thereby been damaged, in order to avail himself of a wilful wrong and injury perpetrated by defendant in commencing the same.

**Purchase of Interest—Consideration.**

When one member of such a copartnership has paid a premium to the other, the consideration for such payment is not only the creation of the partnership between the parties, but also the continuance thereof for the term agreed on.

**Damages.**

If the partner to whom the premium is paid is guilty of misbehavior and misconduct which compels and brings about a dissolution during the term for which the partnership was formed, the premium may be apportioned, and a part returned; the amount thereof to be determined and awarded as damages in an action to dissolve.

**Term of Years—Apportionment of Damages.**

In the case at bar the copartnership was for five years, and was dissolved, through no fault of defendant, at the end of the first year. The court assessed the damages at four-fifths of the premium paid by him to plaintiff. *Held* correct.

Action in the district court for Ramsey county to dissolve a partnership existing between plaintiff and defendant, and for other relief. The case was tried before Kelly, J., who found in favor of defendant, and determined that he was entitled to recover \$2,400 damages. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*L. D. Barnard*, for appellant.

*Martin H. Albin*, for respondent.

**COLLINS, J.**

Plaintiff and defendant entered into copartnership November 1, 1894, for the practice of dentistry in the city of St. Paul, the partnership to continue for five years, defendant paying plaintiff \$3,000 for a half interest in the business theretofore conducted by him. November 14, 1895, plaintiff commenced this action, alleging in his complaint gross misbehavior and misconduct on the part of defendant in respect to the partnership business, and that in several specified ways he had violated the copartnership agreement. The firm indebtedness was alleged to be about \$700, while the assets, it was stated, were insufficient to meet and liquidate the same. The relief demanded was the appointment of a receiver to wind up the business, and also that a dissolution be adjudged. The court below refused to appoint a receiver pending the litigation.

The answer admitted the partnership, the payment of \$3,000 by defendant, and that the firm indebtedness was about \$700. It denied the allegations of the complaint as to defendant's misbehavior or misconduct, or that he had violated the agreement. And as a counterclaim defendant averred full, proper, and perfect performance and compliance on his part in every respect, and a willingness to contribute his share of the amount of money required to meet and pay all firm indebtedness. It set forth certain false and fraudulent statements and representations on plaintiff's part, made for the purpose, and which induced defendant to pay said \$3,000 and to enter into said copartnership. It alleged various acts of misconduct on plaintiff's part in respect to copartnership duties and obligations, and that in a number of particularly specified ways he had violated and disregarded the agreement. It set forth in



detail the amount of business transacted by the firm prior to the commencement of the action, the expense incurred, the amount of profits for the time which had elapsed,—about one year,—and the estimated profits for the remainder of the five-year term. The relief demanded did not particularly differ from that asked by plaintiff.

An agreement was then entered into between the parties under which the firm assets were sold, the debts paid, and the surplus divided; the defendant receiving the sum of \$600. The pendency of the action was recited in the agreement, but it was expressly stipulated:

“That this agreement shall in no way affect the status of the hereinbefore mentioned action brought by said Corcoran against said Sumption, or in any way affect the right of either party to the relief asked for by either of the parties to said action in their respective pleadings, except as herein settled or adjusted, but that either of said parties to said suit shall have the same right to recover in said action, or in any other action, for damages and only damages as he may be able to show himself entitled by reason of the breaches of said partnership agreement by either of said copartners, whether as alleged in said pleadings or otherwise, or on account of any other facts that may be hereafter set up or alleged in any subsequent pleadings in said action, or in any other action by or against either party to this agreement, or against said copartnership, the same as and as fully as if this agreement had not been entered into, for breaches of said articles of copartnership and on account of the misconduct of either of said copartners in the conduct of said partnership matters.”

The reply, made subsequently, alleged this agreement, a copy thereof being attached. Some months afterwards the cause was brought on for trial before the court without a jury, whereupon plaintiff's counsel announced that plaintiff had abandoned his cause of action, and would not introduce evidence to support it. Witnesses were then called and testimony received in defendant's behalf. During the trial the court ruled that for the purposes of the case as it then stood the copartnership was dissolved by the bringing of this action, and that by the subsequent agreement made by the parties the only question for consideration was whether defendant was entitled to recover on account of the matters set forth

in his counterclaim. In this connection the court expressly stated that, if defendant was guilty of some wrong which furnished good cause for bringing this action, he could not recover damages. There was no exception taken to this ruling, and both parties seem to have acquiesced in it, and to have subsequently tried their case with reference thereto. Among the facts found by the court was the following:

"That the defendant also upon his part faithfully performed all the other duties and obligations by him to be performed under said agreement and partnership, and was able, ready, and willing to continue said partnership according to said agreement until prevented by the conduct of the plaintiff as hereinafter found."

And, further: "That on November 14, 1895, the plaintiff above named wrongfully and without cause began this action against the defendant, praying for a dissolution of said partnership, the appointment of a receiver to close up its business, and for other relief, and thereby and thereafter refused to continue said partnership any longer."

There was no finding that defendant was prevented from performing on his part by any act or behavior of plaintiff, except as above set forth; or that the latter had violated the terms of the co-partnership agreement in any other manner than by bringing this action. Counsel for plaintiff argues that the trial court erred when making these quoted findings of fact, and also erred when it made its conclusions of law based upon them.

The position taken by counsel is that, as it was nowhere averred in the answer that defendant had suffered any damages whatsoever on account of the commencement of this action, there could be no such damages recovered; or, to state it differently, that, as defendant's counterclaim and alleged right to recover was predicated wholly upon allegations in the answer of misbehavior and misconduct prior to the commencement of this action, there could be no recovery on findings which were not responsive, and failed to cover such allegations.

It was not necessary for the answer to contain the averments contended for by counsel. The bringing of the action with a complaint charging defendant with a gross violation of his contract stood as a stubborn fact, and it would be an absurdity to hold that

defendant must plead it when answering. Defendant's counterclaim was founded on plaintiff's misbehavior and misconduct and disregard of duty as a copartner; the bringing of the action wilfully and without good cause being one of the wrongful acts and the culmination thereof. The court so held when, on the trial, it ruled, as before stated, that the action itself terminated the partnership, to which no exception was taken. More than this, the parties had covered this identical point when they stipulated in the agreement that either party should recover such damages as he might be entitled to, "whether as alleged in the pleadings or otherwise." The plaintiff declined to substantiate the charges found in his complaint, thus virtually admitting that the present action was unfounded and unjust, and he ought not to find fault with the findings referred to. As was said by the learned trial court, plaintiff should not "complain if held responsible for the necessary and logical consequences of his own deliberate acts." The findings were certainly within the issues, and abundantly warranted the conclusions of law, if the proper measure of damages was adopted.

In addition to ordering judgment formally dissolving the copartnership, the court awarded damages to defendant in the sum of \$2,400, and as to this plaintiff's counsel assigns error. By this award the plaintiff was permitted to retain one-fifth of the amount paid, the other four-fifths being restored to defendant; this because the copartnership had been dissolved when one-fifth of the agreed term had expired, the plaintiff being wholly responsible therefor. He obtained from defendant a premium for a copartnership agreement extending over a period of five years. At the end of the first year he compelled and brought about a dissolution wilfully, and without a just motive, and without a reasonable cause. He could not thereby free himself from his obligations, but must be held responsible for the wrong. The answer was founded on the theory that the damages recoverable would be a sum equivalent to the prospective profits for the four years yet within the life of the agreement, but the trial court proceeded to assess damages on a different basis; that is, on the basis of the premium paid by defendant to plaintiff. The court was right unquestionably. A distinguished writer says:

"The consideration for the premium is not only the creation of a partnership between the person who takes, and him who parts with, the money, but also the continuance of that partnership; and if a person on his entry into a partnership pays a premium and then the partnership is determined sooner than was expected, the question arises whether any, and if any what, part of the premium ought to be returned?" And also: "Disagreements between the partners resulting in a dissolution have given rise to much difficulty. The tendency of modern decisions is to apportion the premium in these cases not only where neither partner is to blame, but a fortiori where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved; and it matters not that the latter may himself not be altogether free from blame; nor is the rule altered by the fact that the partners have consented to dissolve since the institution of legal proceedings." And again: "There is no definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered; but other circumstances must often be taken into account in order to decide what is fair between the parties. At the same time the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership." 1 Lindley, Partn. (2d Ed.) 65-69, inclusive.

The same rule is laid down in 2 Bates, Partn. § 805, and to sustain the order appealed from we are not required to indorse all that is said in these text-books. It is enough for us to adopt and to announce as sound and just the rule that, if the partner to whom the premium is paid is guilty of misbehavior and misconduct which compels and brings about a dissolution during the time for which the partnership was formed, the premiums may be apportioned, and a part returned; the amount thereof to be determined and awarded as damages in the action to dissolve.

Order affirmed.

E. H. CARVER and Others v. S. C. BAGLEY.

February 7, 1900.

Nos. 11,850—(172).

**Logs—Lien under Laws 1876, c. 89.**

Laws 1876, c. 89, amended by Laws 1897, c. 347, gives a lien to a contractor or subcontractor for labor or services performed in cutting, hauling, or banking logs.

**Foreclosure of Lien—Writ of Attachment.**

In an action to foreclose a lien under such statute, it is not necessary that the writ of attachment issued therein should contain a description of the logs to be attached.

**Item Omitted from Lien Statement.**

It is error for the trial court to include in the order for judgment in such an action an item of indebtedness not mentioned in the lien statement. The lien claimant is entitled to a foreclosure of his lien only to the extent of the indebtedness specified in the lien statement.

**Findings Sustained by Evidence.**

Evidence considered, and *held* to sustain findings.

**Appeal—Review of Evidence and Findings.**

It is not the duty of an appellate court to demonstrate by a review and discussion of the evidence returned on appeal the absolute correctness of the findings made by the trial court. Such appellate court will fully consider such evidence, but so far only as is necessary to determine beyond question that it reasonably tends to support the findings.

Action in the district court for Polk county to recover \$3,952 for work and labor performed in cutting, hauling, and banking logs, and to foreclose a lien therefor. The case was tried before Watts, J., who found in favor of plaintiffs in the sum of \$1,902.39. From an order denying a motion for a new trial, defendant appealed. Modified.

*H. Steenerson and W. E. Rowe*, for appellant.

*A. A. Miller*, for respondents.

BROWN, J.

This action is one to recover a balance claimed to be due plain-

tiffs for and on account of certain work and labor performed by them for defendant in cutting, hauling, and banking certain pine and spruce logs, and to have the same declared and adjudged a lien upon such logs, which plaintiff caused to be attached at the time of the commencement of the action, and for a foreclosure of the lien. The statutes providing for a lien in such cases were duly complied with by the plaintiffs. The complaint sets out all these facts, but with greater detail and certainty. The answer admits the main facts, and alleges matters in defense, and still other matters as counterclaims, and defendant asks and demands an affirmative judgment against plaintiffs. The action was tried by the court without a jury. Judgment was ordered for plaintiffs, and defendant appeals from an order denying his motion for a new trial. In this court defendant assigns thirty-one errors, but most of them refer to the question whether the findings of fact are sustained by the evidence, and whether they are sustained is the principal question in the case.

1. The evidence is not very voluminous, but it has taken several readings fully to understand its bearing, and correctly to apply it to the pleadings and issues presented. After a very careful consideration of such evidence, and all that appellant's counsel have said on the subject, we reach the conclusion that the findings must be sustained. The rule by which we are governed is the well-established one that, where there is any evidence reasonably tending to sustain the finding of a trial court, such finding must be sustained. It would serve no good purpose and it is unnecessary that we review the evidence. It is not the province or duty of an appellate court to prove or demonstrate by a discussion of the evidence returned on appeal the absolute correctness of the findings made by the trial court. It is the duty of such appellate court, of course, fully and fairly to consider such evidence, but so far only as is necessary to determine beyond question that it reasonably tends to support the findings; not that the trial court would not have been justified in making findings thereon in appellant's favor, but that the findings made are supported by evidence reasonably tending to establish the facts found. There is evidence of that character in this case.

2. Appellant contends that plaintiffs failed to identify sufficiently the logs attached as those upon which they performed the labor; that the lien statement is defective and insufficient; and that the writ of attachment is void, because it does not contain a description of the logs to be attached. No question was raised in the court below as to the identity of the logs, and it seems to have been taken for granted that the proper logs were attached. The evidence is sufficient on this subject. The lien statement sets out all the facts required by our statute, and is not open to the objections urged against it. Such objections are not of the variety or kind known as "substantial." The statutes do not require the writ of attachment to contain a description of the logs to be attached, and it was not necessary that it contain such description.

3. Appellant's contention that plaintiffs are not entitled to a lien under the statutes (G. S. 1894, § 2451, et seq.) as amended in 1897 (Laws 1897, c. 347) is not sound. Remedial statutes of the character of this one are entitled to a broad and liberal construction; such a construction as will give force and effect to the intention of the legislature. So construed, there can be no question but that plaintiffs, even though they were contractors or subcontractors, are entitled to a lien, and to all the benefits given by the law. The law as amended does not limit the lien to persons who perform "manual labor," but is extended to persons who perform "labor or services."

4. It is also contended by appellant that three distinct causes of action are set up in the complaint, founded upon three separate and distinct contracts, and that the logs cut and banked under one of such contracts cannot be held for the labor performed under either of the other contracts. We were at first impressed that there was something in this point, but reflection and a careful examination of the pleadings and evidence show that there is not. The complaint alleges the making of three agreements, but they were all made at about the same time, and constituted one transaction and one contract. But one cause of action is set up in the complaint, and there was no objection made thereto in the court below. Upon the whole record it seems clear to us that the transaction and

agreements amounted in substance to, and were intended and understood by the parties as, one contract.

5. By the eleventh finding of fact there is found due plaintiffs the sum of \$150 for extra work. Such sum is included in the total amount found due plaintiffs, and judgment is ordered therefor, with interest since July, 1898. This item of indebtedness was not mentioned or included in the lien statement, and is not claimed in the complaint, and should not have been considered by the trial court. Plaintiffs have no lien therefor, because it is not mentioned in the lien statement, and cannot have judgment for its enforcement as a lien upon the logs. Counsel for respondent suggests that the damages awarded defendant for plaintiffs' breach of the contract more than offset this claim. But this is no answer to the objection. Plaintiffs were entitled to a judgment for the foreclosure of their lien to the extent of the amount due them for the work and labor specified in the lien statement, and nothing further. The court below included this nonlienable item in the total amount due plaintiffs, and then deducted defendant's damages. This was error. Defendant was entitled to have the damages resulting from plaintiffs' breach of contract applied in reduction of plaintiffs' lien, and not offset against some nonlienable item not involved in the issues as presented by the pleadings. That this item of \$150 is included in the order for judgment is conclusively shown from the fact that the court below ordered the allowance of interest thereon.

We have examined all of defendant's assignments, and discover no error of sufficient importance to warrant a reversal of the order appealed from; but for the error in including in the judgment the item of \$150 for which plaintiffs were not entitled to a lien the order for judgment must be modified.

The cause is therefore remanded to the court below, with directions to modify its conclusions of law to correspond with the views herein expressed. So ordered.



## STATE v. HOMER S. MINOT and Others.

February 7, 1900.

Nos. 11,893—(26).

**Robbery—Tools in Evidence—Judgment.**

Defendants were indicted, with three other persons, of robbery in the first degree, committed by taking \$20 from the person of the conductor, after holding up a train and attempting to break the express safe. The state offered in evidence in a body the tools and implements found in possession of defendants at time of arrest. *Held:*

1. Not error, under the circumstances.
2. Not error to receive in evidence said tools and implements, although not used in securing the money from the person, it appearing that such articles might have been employed in the crime attempted upon the express car and safe.
3. Not error to receive expert testimony as to the character and use of said implements.
4. Judgment is justified by the evidence.

Homer S. Minot, Charles F. Hoffman, and James C. Hall, with three other persons, were indicted in the district court for Otter Tail county for robbery in the first degree. The case as against the defendants above named was tried before Searle, J., and a jury, and resulted in verdicts of guilty as charged. From a judgment entered on the verdicts, defendants appealed. *Affirmed.*

*A. G. Broker and Charles C. Houpt*, for appellants.

*W. B. Douglas*, Attorney General, *C. L. Hilton*, County Attorney, and *J. W. Mason*, for respondent.

LEWIS, J.

Defendants Minot, Hoffman, and Hall were indicted for robbery in the first degree, in November, 1898, in connection with three other parties, Link Thayer, Edwards, and Ross. Thayer was tried at the November term of court of Otter Tail county, and convicted as charged in the indictment. As to Edwards and Ross, the record is silent, and the other three were brought to trial at the May term, 1899, resulting in a conviction of all three. Defendants appeal from the judgment entered therein.

The evidence offered by the state tended to prove the following facts: At about eight o'clock, on the evening of November 10, 1898, at a point one mile east of Carlisle station, and about eight miles west from Fergus Falls, the through coast train on the Great Northern Railway was held up by four persons, who were armed and masked. Two of the men had boarded the train at Fergus Falls, and, going onto the engine, had, at the point of guns, caused the engineer to stop the train, and after it was stopped these men, in connection with the other two, who were supposed to be in waiting, attempted to enter the safe in the express car, but failed in this, after delaying the train about one hour. While some of the men were engaged in trying to open the safe, the conductor, George A. Bruce, was relieved of \$20, and it was for this particular act that the men were indicted. At about nine o'clock the robbers gave up the task of breaking the safe, and disappeared in the darkness.

It further appeared from the evidence: That on October 27, 1898, Thayer, Minot, Hoffman, and Hall had left Breckenridge, and gone to Clitherall, about fifty miles distant. Thayer returned to Breckenridge on the morning of November 9, the other three going back to Breckenridge on the morning of November 10, arriving there about eight o'clock a. m., and were met at the depot by Thayer. They carried two guns in canvas cases,—one a long, and one a short, case. They placed these guns in a saloon soon after arrival, and the guns were seen at the same place at twelve o'clock, but at one o'clock they were gone. At eleven o'clock next forenoon the guns were found in the saloon again. Thayer was seen at Breckenridge at about 2.30 a. m., November 11, and at 3.10 a. m., the same day, the four men took the train at Wahpeton or Breckenridge, and arrived at Moorhead at about five o'clock a. m., and went to bed at a hotel. At about eight o'clock a. m. they were arrested, in connection with Edwards and Ross, who were in their company. All were searched by the chief of police of Moorhead. Thayer and Minot were found in bed together, and the other two in a different room, at the same hotel. On each man was found a revolver, and on Hoffman were found five drills, four wedges, two

picks, and skeleton tools; also a stick of dynamite and fuse. On Hall were found some explosive caps, and concealed in his coat flap some small saws. From Thayer, while with Minot in the room at the hotel, were taken six drills and two punches.

One witness for the state testified that he had seen Thayer near the scene of the hold-up on November 5, 1898. Messenger McIlrath testified that he was in the express car at the time of the attempt to open it, and that Thayer was the man at work; that his mask fell off, and there was light enough to see. Two other witnesses testified that they had met Thayer and Minot in the road within three or four miles of Carlisle, about five o'clock p. m., November 10. A witness testified to seeing Minot near Carlisle at two o'clock p. m., November 10, and a witness stated that he had seen two men board the train at Fergus Falls, as it passed through, about 7.30 p. m. One was a large, and one a small, man. They were carrying guns in canvas cases,—one short, one long. He had seen one of the same men in the morning of the same day.

The defense attempted to prove an alibi as to each defendant, and also proved that three other suspicious characters were found in a strawstack five miles east from Breckenridge, at ten o'clock a. m., November 11. It appears from the evidence that Breckenridge is about twenty-five miles west of Fergus Falls, and Carlisle about eight miles northwest from Fergus Falls, and about twenty-six miles northeast from Breckenridge. Wahpeton is about one mile west from Breckenridge. There was testimony on the part of the state to the effect that Thayer, the man identified by the messenger, was a large, heavy man, over six feet high; that one of the other men was nearly as large, and one quite small as compared with Thayer, and one medium size; that the men at the time of the robbery designated each other by the numbers 4, 5, 6, and 7. The witness who saw the two men board the train at Fergus Falls testified that he heard the larger of the two say to the smaller, "Be sure of your number, Charlie, 4. I wonder if 7 will make it." The same witness also stated that he identified the larger man as Minot. The messenger testified that the man designated as No. 4 by Thayer in the car was not over five feet nine inches in height, and would weigh probably 170 pounds.

The defense assign as error that the court permitted an unwarranted display of the tools and arms taken from defendants at the time of their arrest. It appears from the record that all the tools and arms above described were placed upon a board, and, being properly marked for identification, were brought into court, and presented to the witnesses causing the arrest to identify them. The collection consisted of the tools taken from the possession of all the six persons found together at Moorhead. The mere fact that they were brought into court in mass, instead of singly, for identification, could hardly be such a display as would prejudice the jury. A trial court should use reasonable care in preventing unusual exhibitions of this character, which might tend to influence a jury, but there is no reason to believe that the occurrence complained of was prejudicial.

A witness on the part of the state was permitted to testify as to the character of the implements found in possession of the defendants. He stated that the files were used, as a general thing, in picking door locks, the drills and punches for opening safes, the ratchet for drilling, and the explosives for the same purpose. The admission of this testimony is assigned as error. The use of such articles in opening locks and safes, and the manner of their application to such purposes, is not of such common knowledge as to preclude expert testimony. The reception of such testimony is within the general rule governing the application of expert testimony in reference to the nature and use of machinery and mechanical appliances.

The court received in evidence, against defendants' objection, all of the articles, without discrimination, found in possession of the six men arrested at Moorhead, and this is assigned as error. One of the objections presented in support of this assignment is that two of the revolvers were taken from Edwards and Ross, who were not on trial, and hence the presentation and receiving in evidence of their revolvers was prejudicial as to the three defendants on trial. Another objection urged is that the specific crime charged against the defendants is robbery, by taking \$20 from the person of Bruce, and none of the articles, except the revolvers,

were admissible, because they were not such implements as would tend to show an intent forcibly to take from the person.

Technically, it was error to receive in evidence the two revolvers found upon Edwards and Ross, who were not then on trial. But it is apparent that such error could not have prejudiced the substantial rights of appellants; for the only significance of the revolvers as evidence was for the purpose of showing that appellants and Thayer were armed, when arrested, with the same kind of weapons as were used in holding up the train and robbing the conductor. This fact was shown by the identification and introduction in evidence of the four revolvers found on the defendants and Thayer, respectively, in connection with evidence that the four persons holding up the train were similarly armed. Proof of this fact in no manner depended on the revolvers found on Edwards and Ross, and the mere fact that six revolvers, instead of four, were exhibited in evidence, with proof that only four of them were found upon defendants and Thayer, would have no reasonable tendency to prejudice their rights. With this exception, it was proper to receive in evidence all of the implements mentioned. While the specific crime charged in the indictment was robbery by taking \$20 from the person of the conductor, Bruce, yet these tools and revolvers formed one of the links in the chain of circumstances tending to fix the guilt upon defendants. The whole transaction surrounding the hold-up—the attempt to open the car and the safe—formed a part of the *res gestæ*. The tools and articles found upon the defendants were such as might have been used in accomplishing such purpose as was attempted. The same parties who held up the train, opened the car, and attempted to open the safe, took the money from Bruce.

The defendants also claim that the evidence fails to support the judgment; that, as a matter of law, the evidence is so uncertain as to the identity of the parties that a reasonable doubt arises as to the defendants' guilt. The defendants present the argument thus: The state, by its evidence, placed the three men, Minot, Hoffman, and Hall, in Clitherall prior to November 10. That on the morning of November 10 they went to Breckenridge, and met Thayer, and placed their guns in a saloon, where they still were

seen at twelve o'clock noon. That Minot could not get from Breckenridge to Carlisle in time to be seen by Larson at two o'clock p. m., and back to Fergus Falls, to catch the train, at 7.30, it appearing that he traveled on foot. That the men could not go from the scene of the hold-up after nine o'clock p. m., and reach Breckenridge by 2.30 a. m., November 11. That the guns were taken from the saloon at Breckenridge between twelve and one o'clock, November 10. That the parties who took them could not have reached Fergus Falls in time for the train without being seen. That the evidence as to alibi was so clear and specific to the effect that they were in Breckenridge and Wahpeton all of the 10th, and until taking the train in the morning, that the jury must have ignored it altogether. That the testimony of identity of defendants by the state's witnesses was too indefinite and uncertain to be relied upon, and that the presence of three other suspicious characters in the vicinity of Breckenridge on the morning of the 11th, and in Fergus Falls on the 10th, was sufficient to raise a reasonable doubt of the guilt of the defendants.

In answer, it is sufficient to say that it was entirely possible for the defendants to separate and leave Breckenridge at different times on the 10th, and reach the places fixed by the state, and they may have traveled in part by team or train. It was entirely possible to reach Breckenridge again by 2.30 a. m. on the 11th, leaving Carlisle at nine p. m. on the 10th. It would be just as reasonable for the jury to infer that the three other questionable characters were co-operating with defendants, though not seen at the robbery, as to infer that the crime was committed by them alone.

As to identity, the evidence is convincing as to Thayer, and almost as strong as to Minot. Hoffman and Hall were not identified, except that they corresponded in size to two of the men engaged in the robbery. The facts that their association and connection with Minot and Thayer had been close before and after the robbery; were found in the same places of resort, where crime is harbored and protected; were equally armed and equipped with the implements of a felonious occupation, and such as were employed in the commission of the crime charged,—present such a

chain of circumstances as, unexplained, would justify the jury in finding beyond a reasonable doubt that they participated in the felony. As to the alibi, it was for the jury to say whether any credit should be given to the evidence. While this line of defense is competent, such evidence is generally subject to searching scrutiny. It is easy to prepare for it in advance, and, after reading the record, we are satisfied that the jury would have been justified in rejecting it entirely.

Judgment affirmed.

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SWEDISH CHRISTIAN MISSION SOCIETY OF MINNEAPOLIS v.  
MARIA M. LAWRENCE and Another.

February 7, 1900.

Nos. 11,896—(201).

**Benefit Insurance—Assignment—By-Laws—Waiver.**

Plaintiff, N., and appellant entered into a triplicate agreement whereby a certificate of membership of \$2,000 was to be taken upon the life of N. in the Minnesota Scandinavian Relief Association, \$1,000 of which was to be payable to plaintiff and \$1,000 to appellant. In the same instrument appellant assigned all her interest to plaintiff, and plaintiff agreed to pay all assessments upon the certificate, and properly to care for N. during his natural life. The by-laws of the relief association provided against an assignment of more than one-half of the amount insured. The certificate was issued and made payable, under said agreement, to plaintiff. *Held:*

1. Such a by-law may be waived by the association for the benefit of those contracting with it.
2. Appellant having contracted with reference to such by-law, and for the purpose of avoiding it, is not, as heir of N., entitled to any part of the money due on the certificate.

Action in the district court for Hennepin county to recover \$1,984.60 on a membership certificate issued by defendant Minnesota Scandinavian Relief Association. The court, Brooks, J., directed a verdict in favor of plaintiff for the amount demanded. From an order denying a motion for a new trial, defendant Lawrence appealed. Affirmed.

*Edward H. Crooker*, for appellant.

*A. A. Anderson and Hendrix & Merritt*, for respondent

LEWIS, J.

On September 16, 1897, the plaintiff, one Andrew Nordin, and his daughter, defendant Maria M. Lawrence, entered into an agreement as follows: Nordin agreed to assign to plaintiff \$1,000 of a death benefit of \$2,000 issued by the Minnesota Scandinavian Relief Association upon the life of Nordin, and to cause a new certificate of membership to be issued, wherein plaintiff should be named as beneficiary to said amount. Maria M. Lawrence, after reciting that Nordin was old, and unable to earn a living, acknowledging her duty to support her father, in consideration of the covenants hereinafter mentioned on part of plaintiff, assigned, sold, and transferred to plaintiff all that part and portion of a new certificate of membership of \$1,000 to be issued by said association upon the life of said Nordin, and authorized said association to pay plaintiff said amount when due. Plaintiff, in consideration of said assignments by appellant, and in consideration of being constituted the beneficiary of said certificate to the full amount of \$2,000, agreed to make payment of all dues and assessments upon said certificates, and agreed to take proper care of said Nordin during his natural life, and defray the expenses of his death and burial. This contract was filed with the relief association, and thereupon a certificate was issued by it upon the life of said Nordin, payable, when the same should mature upon his death, \$1,000 to plaintiff direct, and \$1,000, upon the face of the certificate, to appellant. But in the body of the certificate, and immediately following the above-mentioned stipulation as to payees, is found the following qualification:

"These dispositions of the above life insurance moneys being subject to certain agreements and conditions between the parties, bearing date the 16th day of September, 1897, and filed in the office of this association."

One of the by-laws of said relief association provides that a portion, not exceeding one-half, of the sum insured may be made payable to any designated person as security for and in accordance



with any contract made between such person and the said beneficiary and insured member, provided that a duplicate copy of such contract be filed with the association.

Nordin died March 26, 1898, and plaintiff brought this action to recover the entire amount due upon the certificate, \$1,980.60. The relief association admitted its indebtedness, and paid the amount into court, and the trial proceeded. Appellant answered, denying that the relief association accepted the terms of said triplicate agreement, and alleged that said association was a mutual benefit society organized for the purpose of assisting widows and orphans of deceased members, and that it possessed no authority to assent to said agreement, and to divert its death benefit from such purpose. The answer also contained allegations that plaintiff had failed to comply with its agreement properly to care for Nordin, and that he had been maintained and nursed by his children and members of his family. At the close of the trial, on motion of plaintiff, the court instructed the jury to return a verdict for the plaintiff in the full amount. A motion for a new trial having been made and denied, said defendant Lawrence appealed.

Appellant has attempted to assign as error certain rulings of the court excluding evidence offered upon the question: Did plaintiff properly care for and nurse Nordin during his last sickness? These assignments do not call attention to any particular rulings, and they cannot be considered. This eliminates from the case, as presented here, all questions as to the relative rights of plaintiff and appellant growing out of the covenants of plaintiff to care for Nordin.

The only question presented is: Was the trial court justified in instructing the jury? Was there any evidence reasonably tending to show that plaintiff was not entitled to the money? The purpose of the so-called "triplicate agreement" was to enable the parties to procure a certificate for \$2,000, payable to plaintiff, and to secure some one who would pay the assessments, and take care of Mr. Nordin. Mrs. Lawrence appeared as a beneficiary in name, but assigned all her interest to plaintiff. The by-law of the relief association was enacted for its own convenience, and it had the right to waive it for the benefit of persons doing business with it.

The by-law was not based upon any charter or statutory limitations. Appellant was not deceived by it. She was a party to the arrangement to avoid it, and is not in a position to take advantage of her act. The relief association is ready to pay the money, and appellant has in no manner shown herself or the other heirs to be entitled to any part thereof.

Order affirmed.

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STATE v. FRANKLIN SUGAR-REFINING COMPANY.

February 7, 1900.

Nos. 11,940—(215).

**Taxation of Merchandise upon Track—Merchant.**

Certified facts examined, and *held*:

1. Merchandise shipped into this state, and held in cars on the tracks of the common carrier for the purpose of distribution to parties who had purchased the same previously, although consigned to the shipper for convenience, does not make the shipper a merchant, within the provisions of G. S. 1894, § 1523.
2. Personal property so shipped, and in process of distribution, not subject to taxation under provisions of G. S. 1894, § 1508.

In proceedings in the district court for Hennepin county to enforce delinquent personal property taxes for 1897, Franklin Sugar-Refining Company interposed an answer. The matter was tried before Brooks, J., who found in favor of defendant and, at the request of the state, certified to the supreme court certain points for its decision. Affirmed.

*Louis A. Reed*, County Attorney, *J. T. Hutchinson* and *C. S. Jelley*, for the State.

*Russell, Cray & Jamison*, for defendant.

LEWIS, J.

This is a tax case certified to this court under G. S. 1894, § 1589.

The facts are as follows: The Franklin Sugar-Refining Company of Pennsylvania, a wholesale dealer in sugar, has had since 1891 an arrangement with one Earl of Minneapolis, in this state, by

which Earl was accustomed to solicit offers from purchasers of sugar, which offers he would submit to the company for acceptance or refusal. If offers were accepted, the company so notified Earl, and shipped the sugar to Minneapolis in one of two ways: Either, first, direct to the purchaser; or, second, consigned to the company itself, or its order. The refining company had an arrangement with the common carrier that it might rebill any portion or all of any sugar so shipped to Minneapolis, and consigned to itself or its order, to any other northwestern point within or without the state of Minnesota, and divert such sugar thither at a through rate between Philadelphia and such final point of destination. This arrangement was for the purpose of saving the difference between a through rate to the final point and the rate from Philadelphia to Minneapolis plus the local rate from Minneapolis to such final point. It was the practice of the refining company, when sugar was consigned to itself or its order, at Minneapolis, to send the bill of lading, with the shipper's indorsement thereon, to said Earl, who filed the same in the office of the common carrier at Minneapolis. Said Earl then gave orders on said carriers to such dealers as had given said orders, which orders such consignments were intended to fill. As such orders were filled by the delivery of the sugar, said Earl notified said shipper by wire, and statements were rendered to said purchasers by said shipper, and payment was made direct by such buyers to the shipper. Said Earl was a general merchandise broker, engaged in the same business with other shippers than said refining company. No sugar was shipped into this state by said refining company except to fill and satisfy orders previously received and accepted in the manner stated. Said Earl had no authority to sell sugar for said refining company, or to accept any offer by him secured, or to do anything on behalf of said company except as above stated, and other brokers in Minneapolis during said time had like authority. Said refining company had at no time any warehouse, salesroom, or other place in which sugar was kept in this state, neither did it have any office or place of business in said state, but all sugar sold by it in this state was

delivered to the purchasers direct from the cars of the common carrier.

On May 1, 1897, there was located in cars upon railroad tracks of the common carrier transporting the same in Minneapolis a large quantity of sugar, all of which had been shipped by said refining company upon orders received from said Earl, and which had been consigned to itself or order, and the bill of lading, duly indorsed by said shipper, was held by Earl. On said day all of said sugar was assessed by the assessor of Minnesota, and on account thereof a tax of \$512.32 was levied against said refining company. Said sugar had been shipped to fill orders received from Earl in March, 1897, in the manner stated, part of it awaiting delivery to merchants in Minnesota, and part destined to points outside this state; and a portion of said sugar was after said May 1 carried out of this state, and the remainder was delivered to the parties ordering the same at Minneapolis. Said sugar was not sent into this state for sale, except as aforesaid. Said sugar was contained in fourteen cars, and said shipper had at said time orders for forty-five car loads in Minneapolis and other northwestern points. All of said sugar so assessed could have been used and forwarded to points outside this state, to fill orders then existing.

Upon these findings of fact, the court below ordered judgment that the proceedings to enforce the collection of the said tax levied against said company should be dismissed.

Four different questions have been certified to this court for its opinion. They present theoretical and abstract problems, rather than the essential, concrete question involved in the transaction. But, since the question of the validity of the tax is presented by the findings of fact and conclusions of law found by the court below, we will consider the questions submitted sufficient to command a review of the only practical question in the case.

The county attorney claims that the tax is legal because it appears from the findings of fact that no particular part of the sugar was destined to any particular buyer, and there had been no delivery to such buyers, it having been delivered to the refining company at Minneapolis, and not being in transitu; hence it was taxable under G. S. 1894, § 1508, having acquired a situs in this state.

But this section is qualified by section 1528, which defines "a merchant" as follows:

"Whoever owns or has in his possession, or subject to his control, any goods, merchandise, grain or produce of any kind, or other personal property, within this state, with authority to sell the same, which has been purchased either in or out of this state with a view to being sold at an advanced price or profit, or which has been consigned to him, from any place out of this state, for the purpose of being sold at any place within this state, shall be held to be a merchant. \* \* \* No consignee shall be required to list for taxation the value of any property the product of this state, nor the value of any property consigned to him from any other place for the sole purpose of being stored or forwarded, if he has no interest in such property, nor any profit to be derived from its sale."

The purpose of this statute is to permit the forwarding of merchandise to the proper destination when it has been sold before it enters the state. *McCormick v. Fitch*, 14 Minn. 185 (252); *State v. William Deering & Co.*, 56 Minn. 24, 57 N. W. 313. The consignee named in the bill of lading in this case was the shipper, hence the nominal consignee had an interest in the sugar; but the shipper was named as consignee at Minneapolis as a matter of convenience, and had no interest in the goods, within the meaning of this section. If the transaction amounted to an actual sale previously made, and the sugar was en route to fill the orders, it is of no importance whether the bill of lading was made out in the name of the shipper, the broker, or the buyers. Neither does it matter if for convenience the sugar was shipped in bulk to Minneapolis, with no intention that any particular car or amount should reach any particular purchaser. Nor is it material that part of the sugar was destined to points outside, and part of it to points within, the state. For the same reason the question of technical possession at the time of the levy is not decisive. All these matters were proper to be taken into consideration by the court below in determining whether the sugar was held in Minneapolis on track for sale, or whether it had been sold previous to its entering the state, and was in Minneapolis at that time for the purpose of being distributed to the proper purchasers. The court below has passed upon this question, and settled it adversely to appellant.

It follows that the order of the court below must be affirmed.  
So ordered.

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STATE v. HENRY BELLIN.

February 7, 1900.

Nos. 11,974—(222).

**Taxes—Sale of Forfeited Property by State—Statute of Limitations.**

The rule as to the application of the statute of limitations, laid down in *Kipp v. Elwell*, 65 Minn. 525, followed, in a case where judgment was entered against a tract of land in proceedings had under the provisions of Laws 1881, c. 135, for the taxes from 1870 to 1881, inclusive; and no further steps were taken to enforce the judgment, or to collect the taxes, until May 8, 1893, when a private sale of the land was made to a third party, avowedly under the terms of G. S. 1894, §§ 1616, 1617.

**Same—Lien for Taxes—G. S. 1894, § 1623.**

That part of G. S. 1894, § 1623, by which it was enacted that the lien for taxes on real property should continue until the same were paid, does not affect the provision of the statute of limitations applicable, under previous decisions, to taxes and tax judgments.

In proceedings in the district court for Chisago county to enforce delinquent real estate taxes Henry Bellin interposed an answer. The case was tried before Crosby, J., who directed judgment in favor of the state for \$241.28. At the request of defendant certain points were certified to the supreme court for its decision. Reversed.

Among other questions certified were the following:

“Where more than ten years elapsed after the entry of a judgment for taxes against real estate, by virtue of Laws 1881, c. 135, before any sale thereunder was made; and a private sale was afterwards attempted to be made under G. S. 1894, §§ 1616, 1617, by virtue of said judgment; which sale was declared void by judgment of court, and the money paid by the purchaser was subsequently refunded with interest, pursuant to G. S. 1894, § 1610; has the court power thereafter, upon the facts found in this case, to render judgment against such real estate for the same taxes?”

"If the last foregoing question is answered in the affirmative, then: Can such second judgment be rendered in proceedings other than those for the current year in the next delinquent sale after such refunding?

"Under the facts hereinbefore stated, can the taxes for any year prior to 1874 be included in such second judgment?

"Under the facts hereinbefore stated, can the taxes for the years 1879 and 1880, or either of them, be included in such second judgment?"

*P. H. Stolberg*, County Attorney, for the State.

*Savage & Purdy*, for defendant.

COLLINS, J.<sup>1</sup>

Eleven years' taxes, from 1870 to 1880, inclusive, were included in a judgment entered against the land in question in proceedings had under Laws 1881, c. 135. Nothing further was done towards enforcing the judgment or collecting these taxes. No steps of any kind were taken in reference to the claim until May 8, 1893, when a sale was made to a third party, avowedly in pursuance of the provisions of G. S. 1894, §§ 1616, 1617. The owner of the land then commenced an action against the purchaser, and the sale to the latter was therein annulled and adjudged void, because the land had not been actually sold to, or bid in by, the state for delinquent taxes at the 1881 sale. The county refunded to the purchaser, as provided in section 1610, and thereafter these eleven years' taxes were included in the delinquent list for the first Monday of January, 1899. The owner answered, the court below ordered judgment for the full amount claimed, and then certified up a number of questions, as provided by law.

The primary and principal question involved is not an open one, under our decisions. *County of Redwood v. Winona & St. P. L. Co.*, 40 Minn. 512, 41 N. W. 465, and 42 N. W. 473; *Mower Co. v. Crane*, 51 Minn. 201, 53 N. W. 629; *Pine Co. v. Lambert*, 57 Minn. 203, 58 N. W. 990; *Kipp v. Elwell*, 65 Minn. 525, 68 N. W. 105. The case last cited cannot be distinguished from that now at bar, the only difference being that the sale on which the state relied in that

<sup>1</sup> BROWN, J., took no part herein.

case was by virtue of Laws 1893, c. 150, and at public auction, while the sale here was under the general statutes, and, as therein authorized, made privately. The statute of limitations had run against the taxes for 1880 and prior years, and also against the judgment, long before the attempt to enforce collection through a private sale. The doctrine announced in these cases has become a rule of property, and cannot be departed from. It has recently been affirmed in *Cool v. Kelly*, 78 Minn. 102, and we are satisfied that it is right.

Counsel for the state has attempted to apply the doctrine laid down in *State v. Kipp*, 70 Minn. 286, 288, 73 N. W. 164, to this case. But the facts are not the same. The sale there relied on, made by the auditor in 1885, was but four years after judgment had been entered, and the landowner made no attempt to test its validity for nearly ten years thereafter. The distinction between the facts therein considered and those which were presented in the cases hereinbefore cited was expressly referred to in *State v. Kipp*. And counsel has called our special attention to G. S. 1894, § 1623, which enacts that taxes assessed upon real property shall be a lien thereon, from and including the first day of May in the year in which they are levied, "until the same are paid," except as between grantor and grantee; and he contends, because of this section, to which attention has not been called in any of the cited cases, that the statute of limitations does not apply to taxes or tax judgments, and that we should now so hold.

This claim is founded on the words last quoted, it being argued that, as the lien must last forever in all cases where the taxes are unpaid, the time can never come when the right to enforce this lien is extinguished. It would seem somewhat remarkable if we should attribute to the legislature an intent to declare, by means of this expression, that the statute of limitations should not run as to taxes. The purpose of that part of section 1623 which prescribed the first of May as the day on which taxes should become a lien was to fix a particular date at which to determine the taxability, as well as the ownership and value, of property, for the purposes of assessment and taxation. *County of Martin v. Drake*, 40 Minn. 137, 41 N. W. 942. See also section 1514.



And it was also designed to fix and fasten the lien itself, for such a lien does not arise by implication from the power to tax. It owes its inception, continued existence, and duration to the statute. 25 Am. & Eng. Enc. 267, 275, and cases cited. Nor was that particular section new to the tax laws of this state when it appeared as Laws 1878, c. 1, § 105, by which chapter a decided innovation was made upon the prevailing methods for enforcing the collection of taxes upon real estate; that is, by the commencement of proceedings in district court, and the entry of judgment against each tract of land for the amount due thereon, with interest and costs. This section (1623), in substance, first appeared in the revenue laws of this state in 1860 (Laws, c. 1, § 47). It has since been brought forward, from time to time, with slight changes in phraseology, in all of our general legislation on the subject of taxation, and finally into section 105; *supra*. The words, "until the same are paid," referring to the duration of the lien, have been continued, although their usefulness ended with the adoption of the new methods, in 1878.

The provision in section 105, now section 1623, that taxes assessed upon real property shall be a lien from and after the first day of May of the year of the levy, was and is sufficient to continue the lien down to the time of the last publication of the notice and list of delinquent taxes (section 73, now section 1582), from which time every piece and parcel is bound, and this lien or enforceable claim remains until judgment is entered against the property, which judgment is, in express terms, declared a lien (section 76, now section 1585), all prior claims and liens being therein merged. Whatever may have been the office of the words quoted from section 1623, it is obvious that they have none now. And least of all can they be held to affect or to do away with that part of the statute of limitations which we have held applicable to taxes and tax judgments.

To the second question certified and propounded we answer that, on the facts as found, the trial court had no power to render judgment against the land for the taxes in controversy. This disposes of the case.

The court below will, on remittitur, set aside its order for judgment, and cause judgment to be entered in favor of defendant landowner.

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C. W. ABRAHAMSON v. L. LAMBERSON and Another.

February 8, 1900.

Nos. 11,792—(60).

**Specific Performance—Assignment of Contract of Sale and of Damages—Accounting.**

In an action by an assignee of a contract for the conveyance of land to compel its specific performance, it appeared that the vendee, the plaintiff's assignor, had been wrongfully deprived of the possession of the land for a specified time by the vendor. The assignment not only assigned the contract, but also all the vendee's interest therein and in and to the land therein described, with all the rights, privileges, powers, and liabilities under the contract. *Held:*

1. That the vendee's right to offset his damages for the wrongful act of the vendor against the amount due on the contract passed by the assignment.

2. That in such an action, where it appears that the vendee has been wrongfully excluded from the possession of the premises by the vendor, the latter will, as a general rule, be regarded as a trustee of the land for the benefit of the former, and must account to him for the rents and profits which he received or might have realized by due diligence. But, if there are no rents and profits, or they are less than the actual value of the use of the land, the vendor may be charged with the value of such use during the time the vendee is kept out of possession.

3. Rule applied, and *held*, that the trial court erred in assessing the damages in this case.

Action in the district court for Marshall county to enforce specific performance of a contract. The case was tried before Ives, J., who found in favor of plaintiff. From a judgment entered pursuant to the findings, defendants appealed. *Reversed.*

*H. Steenerson and A. Grindelund*, for appellants.

*A. C. Wilkinson*, for respondent.

START, C. J.

This action was brought to compel specific performance of a contract to convey the farm described in the complaint, and this is the fourth time this court has been called upon to consider the subject-matter of this action.

On May 10, 1889, George Rossman, the then owner of the land, entered into a contract with Halvard A. Strandberg, whereby he agreed to sell and convey the land to the latter for \$2,000 and interest thereon at the rate of ten per cent. per annum, payable in annual instalments equal to the value of one-half of the annual crops raised on the land. The vendee, Strandberg, went into possession of the land by virtue of the terms of the contract, but in November, 1890, the vendor, Rossman, wrongfully excluded the vendee from the possession of the land. Thereupon the vendee, in May, 1892, brought an action against the vendor to recover possession of the land, with damages for withholding possession thereof. Such proceedings were had in that action that the vendee recovered possession of the land and his damages, \$1,000, up to the day of trial, August 2, 1893, which were set off against permanent improvements made on the land by the vendor. An appeal was taken by the vendor from the judgment, which was affirmed in this court. *Strandberg v. Rossman*, 59 Minn. 509, 61 N. W. 675.

The vendee, however, did not in fact regain possession of the land until March 1, 1895, and thereafter, and on July 17, 1895, he assigned his contract to the plaintiff in this action. The interest of the vendor in the contract and land was transferred to the defendants in April, 1895. In February, 1896, the plaintiff commenced this action to enforce specifically the contract for the conveyance of the land. The plaintiff had judgment as prayed for, which was reversed on appeal, this court holding that all claims for damages by the vendee or his assignee, the plaintiff, on account of the vendee being kept out of possession of the land prior to August 2, 1893, were fully satisfied by the judgment in the action of *Strandberg v. Rossman*. *Abrahamson v. Lamberson*, 68 Minn. 454, 71 N. W. 676. After the case was remanded, the plaintiff amended his complaint, and the defendants appealed from an order overruling their demurrer to the amended complaint, and the

order was affirmed. 72 Minn. 308, 75 N. W. 226. The action was then tried by the district court, and findings of fact and conclusions of law made to the effect that the defendants had been overpaid on the contract \$331.87, for which amount the plaintiff was entitled to judgment, and that the defendants convey the land to the plaintiff. Judgment was ordered accordingly, and it was so entered, but it was not entered for the \$331.87 overpayment. The record shows no modification of the order for judgment, or why a recovery of the overpayment was omitted therefrom. The defendants appealed from the judgment.

The trial court found as a fact that the value of the use of the land for farming purposes and for the occupancy thereof for the year 1893, subsequent to August 2, for the year 1894, and to March 1, 1895, was \$1,162.50, and this sum, with the cash payments made on the contract, exceeded the amount due on the contract by \$331.87. The amount of \$1,162.50 so offset against the amount due on the contract is the damages which Strandberg sustained by being kept out of the possession of the land from August 2, 1893, the date to which his damages were satisfied in the first action, to March 1, 1895, the time when he regained possession of the land.

There are 63 assignments of error, but there are only two general questions for our consideration: First. Did the right to set off the damages which Strandberg sustained pass by his assignment of his contract to the plaintiff? Second. Did the trial court assess such damages on the proper basis, and for a correct amount?

The defendants insist that the assignment of the contract by Strandberg to the plaintiff did not assign the right of the former to the damages he sustained by being kept out of possession of the land from August 2, 1893, to March 1, 1895. It may be conceded that a naked assignment of the contract would not assign such damages, but an assignment of the contract, together with all the vendee's interest therein and in and to the land therein described, with all the rights, privileges, powers, and liabilities under the contract, would be broad enough to assign the damages. This was expressly decided by this court on the former appeal in this case.

Abrahamson v. Lamberson, 72 Minn. 308, 75 N. W. 226. The assignment in question contains this language:

"Which, together with all and singular the premises therein mentioned and described, together with the deed therein mentioned, and all the rights, privileges, powers, and liabilities in said contract and deed therein referred to, are hereby, by these presents, sold and transferred by us to the said party of the second part," [the plaintiff].

It also, by its express terms, authorizes the plaintiff

"To pursue any and all remedies against the parties mentioned and set forth in said contract to complete the title to the premises therein described in himself, the same as I might or could do were this assignment not made."

The provisions of the assignment which we have quoted are sufficient to assign to the plaintiff the damages and the right to offset them against any amount due on the contract. The damages which the vendee in this case was entitled to offset against the purchase price of the land and interest thereon by reason of his being kept out of the possession of the land by the wrongful act of the vendor are to be ascertained upon an equitable basis. In an action to compel the specific performance of a contract for the conveyance of land, where it appears that the vendee has been kept out of possession by the wrongful act of the vendor, the general rule is that the latter will be regarded as a trustee of the land for the benefit of the former, and must account to him for the rents and profits which he received or might have realized by due diligence. The rule is not inflexible in its application, for, if there are no rents and profits, or if they are less than the value of the use of the land, the vendor, in the discretion of the court, may be charged with the value of such use during the time the vendee is so kept out of possession. In special cases, where equity requires it, the court will not allow the vendor any interest on the purchase price during the time he retains possession of the land, nor charge him with the interim rents and profits. Equity will in each case place the parties, so far as possible, in the same situation as they would have been if the contract had been performed according to its

terms. Fry, Spec. Perf. §§ 1375-1377; Worrall v. Munn, 38 N. Y. 137, 139.

In the case at bar the plaintiff is entitled to offset against the purchase price, and interest thereon, of the land, the rents and profits received by the defendants' grantor from the land, or which he might have realized by due diligence, from August 2, 1893, to March 1, 1895, or, at plaintiff's election, the value of the use of the land during such time. He is not entitled to both. *Abrahamson v. Lamberson*, 68 Minn. 454, 71 N. W. 676. In ascertaining the amount of such rents and profits, the necessary expenses of raising, securing, and marketing the crops, and the amount paid, if anything, for taxes and necessary repairs, must be deducted; but nothing can be allowed for the personal services of the vendor in superintending the management of the farm, as he was a trustee in his own wrong.

It is not entirely clear from the record what basis the trial court adopted in assessing the plaintiff's damages, but it is manifest that an error was committed in ascertaining the amount thereof, for which a new trial must be granted. The trial court admitted evidence, over the objections of the defendants, to show the value of the crops of wheat and oats raised on the land during the year 1893, and the value of such crops was taken into account by the court in ascertaining the amount of the rents and profits to be charged to the defendants. This was grossly inequitable. The plaintiff's assignor received full satisfaction for all of his damages for being kept out of possession from the time he was dispossessed to August 2, 1893. This necessarily included all the loss he sustained by being deprived of the use of the land to raise a crop during the cropping season of 1893. The court will take judicial notice that there can be no profits from land in this state arising from a crop of wheat or oats grown between the months of August and March, for the simple reason that such a crop is an impossibility. The crop in question was practically ready to be harvested on August 2, 1893, and, full satisfaction having already been made to the vendee for the use of the land during the time the crop was growing, the defendants cannot be charged with the value of such crop.

It follows that in ascertaining the amount of the rents and profits to be charged to the defendants the value of the crops of 1893 must be excluded. Judgment reversed, and a new trial granted.

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CONRAD J. ERTZ v. PRODUCE EXCHANGE OF MINNEAPOLIS  
and Others.

February 8, 1900.

Nos. 11,922—(206).

**Conspiracy—Complaint Good upon Demurrer.**

A complaint which alleges that the plaintiff, a dealer in farm produce, had a profitable business, that the defendants had conspired to refuse to deal with him and to induce others to do likewise, it not appearing that their interference with his business was to serve any legitimate interests of their own, but that it was done maliciously, to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, states a cause of action.

Appeal by defendants from an order of the district court for Hennepin county, Simpson, J., overruling a demurrer to the complaint. Affirmed.

*Stiles & Stiles*, for appellants.

In the absence of statute, all the allegations of the complaint as to the motive or intent of defendants are immaterial, for the reason that the acts charged are in and of themselves strictly legal, and no legal act can be made illegal by reason of its being actuated by a malicious motive. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Schulten v. Bavarian*, 96 Ky. 224; *McHenry v. Sneer*, 56 Iowa, 649; *Adler v. Fenton*, 24 How. 407; *South Royalton v. Suffolk*, 27 Vt. 505; *Bowen v. Matheson*, 14 Allen, 499; *O'Callaghan v. Cronan*, 121 Mass. 114; *Rice v. Coolidge*, 121 Mass. 393, 399; *Cooley, Torts*, 278; *Payne v. Western*, 13 Lea, 507; *Heywood v. Tillson*, 75 Me. 225. The allegations which charge defendants with having conspired to do the acts set forth, and with having done said acts pursuant to such conspiracy, are likewise wholly

immaterial, for the reasons that the acts themselves are perfectly legal and that legal damage, and not the conspiracy, is the gist of this action. *Bohn Mnfg. Co. v. Hollis*, supra; 6 Am. & Eng. Enc. (2d Ed.) 873; *Robertson v. Parks*, 76 Md. 118; *Hunt v. Simonds*, 19 Mo. 583; *McHenry v. Sneer*, supra; *Laverty v. Vanarsdale*, 65 Pa. St. 507; *Adler v. Fenton*, supra; *Savile v. Roberts*, 1 Raymond, 374; *Wellington v. Small*, 3 Cush. 145; *Kimball v. Harman*, 34 Md. 407; *Rice v. Coolidge*, supra; *Cooley*, Torts (2d Ed.) 329.

*James Robertson and M. C. Brady*, for respondent.

The complaint not only charges a conspiracy on the part of defendants not to deal with plaintiff, but that such conspiracy was formed to influence others not to deal with him, and that it so resulted. It also appears that the conspiracy was not for the purpose of protecting any real or imaginary right of defendants, but solely to injure plaintiff in his business, by wantonly and maliciously refusing to deal with him and influencing others to do likewise, and this marks the line between the Bohn case and this action. In the one case there was an attempt on the part of retail dealers to protect their business from the encroachments of a wholesaler. In the case at bar it is an attempt of some retailers, through malice, to injure the business of a competitor. In the one case it was not actionable, and in the other it was. *Delz v. Winfree*, 80 Tex. 400; *Van Horn v. Van Horn*, 52 N. J. L. 284; *Doremus v. Hennessy*, 176 Ill. 608. The Bohn case has not met with favor by the majority of courts of last resort. *Hopkins v. Oxley S. Co.*, 49 U. S. App. 709; *Jackson v. Stanfield*, 137 Ind. 592.

Injuries to property indirectly brought about by menaces, false representations or fraud create as valid a cause of action as any direct injury from force or trespass. 1 Addison, Torts, 20; *Walker v. Cronin*, 107 Mass. 555, 562; *Carew v. Rutherford*, 106 Mass. 1, 10; *Boutwell v. Marr* (Vt.) 43 L. R. A. 803; *People v. Chicago*, 170 Ill. 556; *Payne v. Western*, 13 Lea, 507; *Schulten v. Bavarian*, 96 Ky. 224. But, independently of the common law, Laws 1899, c. 359, governs the action. See *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 324; *U. S. v. Addyston P. & S. Co.*, 54 U. S. App. 723. While the federal act affirmatively gives a right of ac-



tion to the injured party and our act does not, yet the doctrine is well settled that where a party commits an act which is criminal and another suffers damages in consequence, a right of action accrues to the injured party. Cooley, Torts, 88, 124; 8 Am. & Eng. Enc. (2d Ed.) 598, and cases cited; 1 Bishop, Crim. Law, § 264; 2 Addison, Torts, 850; *Doremus v. Hennessy*, *supra*.

START, C. J.

The defendants interposed a general demurrer to the complaint in this case, and they appealed from the order of the district court of the county of Hennepin overruling their demurrer. The material facts alleged in the complaint are these:

The plaintiff is now, and for two and a half years past has been, engaged, at the city of Minneapolis, in the business of a commission merchant, buying and selling farm produce and commodities. His profits from his business, prior to the committing of the wrongs hereinafter stated by the defendants, were \$20,000 per year. To enable him to conduct his business, it has been and is necessary for him to buy such farm produce and commodities in the market at Minneapolis, and resell the same to his customers. The defendants, during the time the plaintiff has so conducted his business, have been, and still are, engaged in buying and selling farm produce and commodities, and they are practically all the persons, firms, and corporations who are engaged in such business in the city of Minneapolis, and during such time they did and still do control, regulate, and govern the quantity and price of such farm produce and commodities, and the purchase and sale thereof. The plaintiff, prior to July 19, 1899, was accustomed to and did purchase the produce and commodities so dealt in by him from the defendants, and paid them therefor in full. But on the day named, and at various subsequent times, the defendant the produce exchange conspired, confederated, and agreed to and with all of the other defendants herein not to sell to, or buy of, plaintiff, in any manner, any farm produce or commodities for the purpose of carrying on his business. The defendant the produce exchange then and there did maliciously solicit and procure from all of its codefendants, and each of them, and from many other persons to the

plaintiff unknown, an agreement not to sell to, or buy from, plaintiff such products and commodities, and did so induce its codefendants, and each of them, and other persons, by the aid of, and through the influence of, all of the defendants, not to sell to, or buy of, the plaintiff any of such products and commodities, for the purpose of his business or otherwise. In pursuance of such conspiracy, each and all of the defendants have, with such malicious and unlawful intent, ever since July 19, 1899, refused so to sell to, or buy of, the plaintiff, and have daily circulated among and reported to the patrons of the plaintiff that he was unable to buy, such products and commodities, with the intent of inducing such patrons to discontinue doing business with the plaintiff. The business of the plaintiff, by reason of the premises, has been ruined, and he has been damaged thereby in the sum of \$25,000.

If the allegations of the complaint are true, and the demurrer admits them, it is certain that the plaintiff has suffered material financial injury by the acts of the defendants. Does the law afford him any remedy? Counsel for the defendants insist that the question must be answered in the negative, because their acts in the premises were lawful, and, being so, the intent with which they did the acts is immaterial. It may be conceded that, if the acts of the defendants were lawful, the motive which actuated them is immaterial in determining the strict legal rights of the parties. The question, then, is, were the defendants' acts legal? In its broadest aspect, this question involves considerations of the highest importance to the individual and to the public. The genius of our free institutions encourages all men to seek better fortunes, higher levels, and larger opportunities for success in life. Therefore, within proper limits, it is both lawful and commendable for men to combine for the purpose of securing better wages or larger returns from their business ventures. It is not, however, our purpose to enter upon any general discussion as to the limitations upon this right of men to combine for the purpose of furthering their own interests, without reference to the rights of others. Our sole purpose is to inquire whether the acts of the defendants in this case were, as to the plaintiff, lawful.

The defendants rely upon the case of *Bohn Mnfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, in support of their contention that the defendants' acts in question were lawful. The general propositions of law laid down in the decision in that case are sound, as applied to the facts of that particular case, which were substantially these: The defendants were retail lumber dealers, and formed a voluntary association, by which they mutually agreed that they would not deal with any wholesale dealer who should sell lumber to persons not dealers at the place where a member of the association was carrying on business. The object of the association was to protect its members against sales by wholesale dealers to contractors and consumers. In case a wholesale dealer made any such sale, and refused to make amends therefor, as provided by the by-laws of the association, its secretary was required to notify all of its members of the fact, and thereafter such members were to refrain from dealing with the offending wholesale dealer. The plaintiff, the Bohn Manufacturing Company, a wholesale dealer, having made such a sale, the secretary of the association was about to send notice of the fact to all of its members. Thereupon the company commenced an action for a permanent injunction, enjoining the defendants from issuing such notices. This court held that the action would not lie. The decision was correct, but it is not applicable to the alleged facts in this case.

It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried

into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful.

It is true, as claimed by the defendants and as stated in the Bohn case, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men, as he sees fit, and that the right which one man may exercise singly, many may lawfully agree to do jointly by voluntary association, provided they do not interfere with the legal rights of others. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him. See *Walker v. Cronin*, 107 Mass. 555, 562; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Graham v. St. Charles*, 47 La. An. 214, 16 South. 806; *Hopkins v. Oxley S. Co.*, 49 U. S. App. 709. This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action.

Order affirmed.

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EDWARD W. BACKUS v. DELIA A. AMES.

February 8, 1900.

Nos. 11,928—(213).

79	145
107	Wis 27
79	145
84	504
79	145
85	137

### **Negligence of Insurance Broker—Charge to Jury.**

This is an action to recover damages on account of the alleged negligence of the defendant's testator, as an insurance broker, in failing to replace two policies of insurance upon the plaintiff's lumber before it was destroyed by fire. *Held*, the trial court did not err in instructing the jury to the effect that the law presumes that the broker did his duty, and that the defendant was not obliged to offer any evidence to show that he exercised ordinary care in the premises until the plaintiff had shown that he was negligent.

**Duty of Broker.**

When a broker undertakes to place insurance for another, it is his duty, in case he is unable to do so, seasonably to notify his principal, but his duty to give such notice does not begin until he has had a reasonable time in which to find out, by the exercise of ordinary diligence, whether or not he can place the insurance.

**Expert Witness—Discretion of Court.**

The question of the competency of a witness to give expert evidence is largely in the discretion of the trial court, and its decision thereon will not be reversed, if there is any evidence fairly tending to support it.

**Evidence of Hazardous Risk.**

As bearing on the question of the deceased broker's negligence, evidence tending to show the hazardous nature of the risk to be insured against, and the difficulty of securing insurance on the property in question, was competent and material.

**Verdict Sustained by Evidence.**

The verdict for the defendant is sustained by the evidence.

Action in the district court for Hennepin county against defendant, as executrix of the will of Eli B. Ames, deceased, to recover \$4,000 damages for decedent's negligence in failing to replace policies of fire insurance. The case was tried before Pond, J., and a jury, which rendered a verdict in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*Fifield, Fletcher & Fifield*, for appellant.

*Flannery & Cooke*, for respondent.

START, C. J.

The defendant's testator, Eli B. Ames, was, on August 12, 1893, and had been for some years prior thereto, an insurance agent and broker, doing business as such at the city of Minneapolis. He died February 12, 1898, and this action was brought against his executrix to recover damages for his alleged negligence, as such broker, in failing to replace two policies of insurance, aggregating \$4,000, upon certain lumber belonging to E. W. Backus & Co., which was destroyed by fire August 13, 1893. The plaintiff has succeeded to all the rights of the firm. Trial by jury, verdict for the defend-

ant, and the plaintiff appealed from an order denying his motion for a new trial.

1. The first claim urged by plaintiff is that the trial court erred in giving the defendant's sixth and seventh requested instructions. They were to the effect that the burden was upon the plaintiff to establish the negligence of Ames, because the law presumes that he did his duty, and that the defendant was not obliged to offer any evidence to show that he exercised ordinary care in the premises until the plaintiff had shown that he was negligent. The correctness of the instructions, as general rules of law, is not questioned, but it is urged that, in view of the particular facts of this case, they were inaccurate and misleading. The special facts claimed were that the plaintiff had two policies of insurance on his lumber yard, which were in force, and were on Saturday, August 12, 1893, surrendered to the agent of Ames, upon his promise to procure other policies in their place, and bring them to the plaintiff during the afternoon of that day, which the agent failed to do. The plaintiff insists that this agreement of the agent must be taken exactly as if made by Ames himself, and that it amounts to an express admission by him that there was a reasonable time during the afternoon in which to replace the insurance and to return the policies; hence his unexplained failure to do so is *prima facie* negligence, and therefore the instructions were erroneous.

If the plaintiff had brought an action on the contract in the lifetime of Ames, or had presented his claim for damages arising from a breach thereof to the probate court, then proof of the contract and its breach would establish a *prima facie* right to damages. But such is not this case. The plaintiff elected to cut loose from his contract, if he had one, thereby obviating the necessity of presenting his claim for damages for its breach to the probate court, and brought an action for tort, pure and simple, against the executrix, for damages on account of the alleged negligence of her testator as his agent or broker. There could be no recovery against the executrix on the alleged contract in an original action in the district court, for all such claims must be presented to the probate court within the time limited, or they are barred. G. S. 1894, §§ 4511-4514. It follows that the rules of evidence applicable

to an action for negligence, as distinguished from one on contract, apply to this case, and that the mere fact that the agent did not place the insurance within the time limited did not relieve the plaintiff of the burden of proving the negligence of the agent in the premises, or require the executrix to show affirmatively that he exercised ordinary care.

It is true, as claimed, that there are many cases where a party assuming a duty is bound, when called to account, to show that he used due care in the premises. Such is the case where the duty assumed is one for personal service, and there is no dependence on the act or consent of another. But in this case the placing of the insurance was a matter which the agent had no power to control. He did not undertake to become the insurer of the property, nor could he place the insurance in any of the companies he was then authorized to represent, as his own agency was then carrying a full line on the risk. It is practically conceded that he undertook, as the agent or broker of the plaintiff, to secure the insurance for him in such companies as might be willing to write it. The court did not err in giving the instructions complained of.

2. The trial court instructed the jury that, if Ames undertook to act as plaintiff's insurance broker in placing the insurance in question, he was bound to proceed, and exercise all reasonable diligence and effort in the premises, and if, after using such diligence and effort to secure such insurance, he found himself unable to do so, then it was his further duty promptly so to notify the plaintiff, and, if such notice was not in fact given, he was negligent;

"Provided, however, you do not further find that at the time it became, in the event aforesaid, the duty of said Ames to give plaintiff such notice, the lumber which was to be covered by such proposed insurance had not then been already destroyed by fire."

The court also instructed the jury as follows:

"In the event you do find that this intervening time was reasonably sufficient for the purpose of giving plaintiff such notice, and you further find that plaintiff would not, under the circumstances, have been able to have procured such other insurance after such notice, then the fact of said Ames not having given such notice is immaterial."

The giving of the proviso, and the further instruction which we have quoted, are assigned as error. When a broker undertakes to place insurance for another, it is his duty, in case he is unable to do so, seasonably to notify his principal. He is bound to proceed with all reasonable diligence to ascertain whether he can place the insurance, and, in case of failure, he must give the notice, but the duty of giving the notice does not arise until after the lapse of a reasonable time in which to make due efforts to place the insurance. The trial court fully and explicitly charged the jury that such was the duty of Ames in this case.

The proviso complained of was to the effect that the duty of Ames to give such notice did not begin until he had exhausted all reasonable efforts to place the insurance, and, if that time had not expired before the lumber was destroyed by fire, he was not bound thereafter to give the notice. This was clearly correct, for the reason of the rule requiring notice to be given is to afford the principal an opportunity to secure, if he can, insurance elsewhere. But, if the property to be insured is destroyed before the time arrives when the broker is required to give notice of his inability to secure the insurance, it would be an idle form to give it afterwards. It was not error for the court to add the proviso. Nor was it error for the court to instruct the jury, in effect, that any failure of Ames to give the notice would be immaterial, if, as a matter of fact, the plaintiff would have been unable to have placed the insurance, even if notice had been given. The failure to give the notice, in such a case, would not be the proximate cause of the plaintiff's damages; hence it would be immaterial. The evidence on the trial made the giving of the instructions complained of pertinent, for it tended to show that it was nearly noon on Saturday, August 12, 1893, when the agreement to procure other insurance was made, that many of the insurance offices were closed during the afternoon, and that it was difficult to get insurance on the lumber in question at that time. The fire occurred before noon of the next day (Sunday).

3. An insurance adjuster was called as a witness for the defendant, who testified that he had been adjusting losses for fire insurance companies for seven or eight years, during which time he had



made investigations as to the value of lumber in the city of Minneapolis and other cities; that he saw the lumber of the plaintiff in question before the fire, and knew its value. The cross examination of the witness as to his competency to express an opinion as to the value of the lumber tended to modify materially his positive statement that he knew its value, but, over the objections of the plaintiff that the witness had not been shown competent, he was permitted to give his opinion as to the value of the lumber. This is assigned as error. The question of the competency of a witness to give expert evidence is largely in the discretion of the trial court, and its decision of the question will not be reversed, if there is any evidence fairly tending to support it. *Papooshek v. Winona & St. P. R. Co.*, 44 Minn. 195, 46 N. W. 329; *Blondel v. St. Paul C. Ry. Co.*, 66 Minn. 284, 68 N. W. 1079. The decision of the court as to the competency of the witness falls within this rule, and must be and is sustained.

Exception was also taken by the plaintiff to the admission of evidence on the part of the defendant tending to show the hazardous nature of the risk, the difficulty of securing insurance on the property in question, the reluctance of insurance companies to write such insurance, and that many of the insurance offices were closed on Saturday afternoon. It is urged that this was error, because Ames assumed the duty of procuring the insurance with full knowledge of the situation, and whether it was an easy or a difficult task was immaterial, in view of the fact that no attempt was made to show what he actually did do in the premises. If this action had been brought in the lifetime of Ames, there would be some force in the suggestion. But, because it was impossible for the defendant to offer direct evidence as to what her testator did, it by no means follows that she was precluded from giving circumstantial evidence tending to show the unreasonableness of the plaintiff's claim that Ames' failure to secure the insurance before the fire was due to his negligence. The evidence received was competent and material, as bearing on the question of the broker's negligence.

The admission of testimony tending to show that Ames, some thirty days before the time in question, made an unsuccessful effort

to induce certain insurance companies to increase their risk upon the plaintiff's lumber, is also assigned as error. It was not error to admit this evidence. It was competent, as tending to show that insurance companies were reluctant to place insurance on the property in question. The objection that the testimony involved a conversation between the witness giving it and a deceased person is without merit, for the witness was not a party to the action nor interested in the result thereof.

4. The only other assignment of error meriting special mention is that the verdict is not sustained by the evidence. Our conclusion on this question, based upon a consideration of the whole record, is that the verdict is a just one, and that it is reasonably supported by the evidence.

Order affirmed.

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DEKALB NATIONAL BANK v. JOHN THOMPSON and Others.

February 8, 1900.

Nos. 11,933—(208).

**Promissory Note—Purchase in Good Faith.**

The verdict in this case, to the effect that the plaintiff was not a bona fide purchaser of the note which is the subject-matter of the action, is sustained by the evidence.

Action in the district court for Swift county to recover \$600 on a promissory note. The case was tried before Qvale, J., and a jury, which rendered a verdict in favor of defendants. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*F. M. Thornton and S. H. Hudson*, for appellant.

*Marshall A. Spooner*, for respondents.

START, C. J.

Action upon a promissory note. The answer was, in effect, that the note was obtained by fraud, and was without consideration. Verdict for the defendants, and the plaintiff appealed from an order denying its motion for a new trial.

For the purposes of the trial only, it was admitted that the note was without consideration, and was obtained by fraud, as alleged in the answer. The plaintiff, however, claimed that it was a bona fide purchaser of the note, in the usual course of business, before its maturity, for a valuable consideration. This claim was the only issue submitted to the jury, and the only question raised on this appeal is that the verdict in favor of the defendants on this issue is not sustained by the evidence.

When it was shown or admitted that the note was obtained by fraud and was without consideration, the burden was placed upon the plaintiff to show that it acquired the note in good faith, and for a valuable consideration. *Cummings v. Thompson*, 18 Minn. 228 (246); *Merchants Ex. Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434; *Bank of Montreal v. Richter*, 55 Minn. 362, 57 N. W. 61. Hence the issue was for the jury to determine, unless the evidence was, as a matter of law, conclusive that the plaintiff did so acquire the note.

It appears from the evidence that the note in question was for \$600, payable to the order of W. A. Godwin & Son, but that the real owner of the note, at all times prior to the time the plaintiff purchased it, was W. L. Elwood, and that it, with two other notes, was given for the purchase price of a stallion, the property of Elwood, and sold by W. A. Godwin & Son for him. The note, when the plaintiff acquired it, was not, so far as the record shows, indorsed by the payee, the firm of W. A. Godwin & Son; but there was a guaranty of payment of the note on the back thereof, signed by William A. Godwin and A. G. Godwin, respectively. Whether they constituted the members of the firm named as payee does not appear.

It would seem that the note was not indorsed by the payee, to whose order it was payable, and that therefore the plaintiff was not, in any event, in position to claim the rights of a bona fide purchaser before maturity. If a promissory note payable to the order of a party is transferred without his indorsement, the holder takes it as a mere chose in action, subject to all defenses thereto. *Van Eman v. Stanchfield*, 10 Minn. 197 (255); *Fredin v. Richards*, 61 Minn. 490, 63 N. W. 1031; *Slater v. Foster*, 62 Minn. 150, 64 N.

W. 160. But this point is not here urged by the defendants, and we base our conclusion that the order appealed from must be affirmed upon the ground that the evidence as to whether the plaintiff was in fact a bona fide purchaser of the note, within the law merchant, was such as to make the question one of fact for the jury. It is true that the plaintiff's cashier, who discounted the note, gave evidence tending to show that the bank took the note for value and in good faith, without notice, in the usual course of business, and that there was no direct contradiction of his testimony. But the circumstances connected with the transfer of the note by Elwood to the bank, and his relation to the bank and its officers, and its action with reference to the note after it became due, as disclosed by the evidence, were such as reasonably to justify the jury in concluding that the note was transferred to the bank for the purpose of enabling it to sue the note in its own name, in order to deprive the defendants of their defense, and that the bank was a party to such purpose. We are satisfied from an examination of the whole record that the verdict is sustained by the evidence.

Order affirmed.

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HARRIET McNEAL v. H. A. RIDER and Others.

February 9, 1900.

Nos. 11,871—(193).

### **Farming on Shares—Title to Crop in Owner—Chattel Mortgage.**

A contract for the cultivation of a farm on shares, in and by the terms of which the landowner reserves the title to the cropper's share of the crops raised, as security for advances made to him, is in legal effect a chattel mortgage, in so far as it operates as security for the payment of such advances, and, to be valid as against subsequent bona fide purchasers, must be filed in accordance with G. S. 1894, § 4129.

### **Tenants in Common.**

Under such a contract, the parties thereto are, until division, tenants in common of the crops.

Action in the district court for Morrison county against H. A. Rider, as sheriff of said county, and others, to recover possession of personal property, or the sum of \$1,000, the value thereof, in case delivery could not be had, and \$100 damages for the detention. The case was tried before Searle, J., who found that plaintiff was entitled to judgment for a return, or for the value of the property, determined to be \$133.15. From an order denying a motion for a new trial, defendants appealed. Reversed.

*Calhoun & Bennett and John H. Rhodes, for appellants.*

*G. W. Stewart, for respondent.*

BROWN, J.

This is an action in claim and delivery for the possession of certain wheat, of the value of \$133.15. It was tried by the court without a jury. Plaintiff had judgment, and defendants appeal from an order denying a new trial.

On March 27, 1897, one Milbury was the owner of the tract of land on which the wheat in controversy was raised, and entered into a contract with one Lutes, under which Lutes undertook and agreed to cultivate and farm the land for a share of the crops. This contract is in the form of, and substantially similar to, those considered and construed in *Wright v. Larson*, 51 Minn. 321, 53 N. W. 712; *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617; *Anderson v. Liston*, 69 Minn. 82, 72 N. W. 52; and *Avery v. Stewart*, 75 Minn. 106, 77 N. W. 560. Under and by its terms, Lutes agreed to till and farm the land in a good and farmerlike manner during the season of 1897, to furnish at his proper cost and expense all proper and convenient tools and machinery necessary to carry on and cultivate the farm, to furnish and provide all proper assistance and hired help, to protect the fences and shade trees, and to cultivate the land in the best possible manner, and, as soon as the crops were removed, to replot the land and put it in suitable condition for the succeeding year's crop, and further,

"Not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, of any kind, character, or description, until the division thereof, without the written consent of party of second part; and, until such division, the title and possession of all hay, grain, crops, and produce raised, grown, or

produced on said premises shall be and remain in party of second part, and said party of second part has the right to take and hold enough of the crops that would on the division of said crops belong to party of the first part to repay any and all advances made to him by party of the second part, and interest thereon at ten per cent. per annum, and also to pay all indebtedness due said party of second part by said party of first part, if any there be. It is also agreed that, in case said party of the first part neglects or fails to perform any of the conditions and terms of this contract on his part to be done and performed, then said party of the second part is hereby authorized and empowered to enter upon said premises and take full and absolute possession of the same; and he may do and perform all things agreed to be done by party of the first part remaining undone, and to retain or sell sufficient of the crops raised on said premises, that would otherwise belong to said first party if he had performed the conditions thereof, to pay and satisfy all costs and expenses of every kind incurred in performing said contract, with interest at ten per cent. per annum, and the residue remaining, if any, of said crops, shall belong to said party of first part after all conditions hereof are fulfilled."

This contract was duly assigned by Milbury to the plaintiff on September 14, 1897, but was never filed in the office of the town clerk of the town in which the farm is located, or elsewhere. The plaintiff claims that certain advances were made to Lutes, under the terms of the contract, to the amount of \$133.15, which have never been paid; and she bases her claim to the wheat under and by virtue of the provisions of the contract giving her the right to take and hold enough of Lutes' share of the crops to secure and pay all advances made to him. On September 7, 1897, for a valuable consideration, and in the ordinary and usual course of business, said Lutes made and executed a chattel mortgage upon his share of the crop of wheat so raised under such contract, to one Wilson, to secure the payment of a promissory note for the sum of \$183.29. This mortgage was duly filed, and was sold and transferred to defendant Bouck on October 13, 1897. This defendant claims title to the wheat under this mortgage, and another not necessary to mention; and defendants Rider and Morrill justify as sheriff and deputy sheriff, and under a writ of attachment issued against Lutes in favor of defendant Bouck.

There is no controversy as to the facts. Plaintiff asserts title to the wheat under her farm contract, and defendants assert title

and right to the possession thereof under the Wilson mortgage and the writ of attachment. There is no question as to the validity and good faith of the Wilson mortgage, and, as there can be no serious doubt but that the appeal from the order vacating the writ of attachment revived and continued the writ in force until such appeal was dismissed, the case narrows down to the question whether the contract under which plaintiff claims the wheat is in effect a chattel mortgage, at least in so far as it gives her the right to hold Lutes' share of the crops raised thereunder as security for advances made to him, and whether to be valid as against subsequent mortgagees and attaching creditors, it should have been filed in the proper town clerk's office. If it was necessary to file such contract, to give it validity and priority over subsequent creditors and mortgagees, the rights of the defendants are superior to plaintiff's, and they should have judgment, because the contract was not filed. The answer does not allege a transfer of the Wilson mortgage to defendant Bouck, but the mortgage and the assignment thereof were received in evidence, and are before the court, and must be considered, even though they were duly objected to by plaintiff.

A proper disposition of the case renders necessary a consideration of the questions (1) as to the respective rights and interests of the parties to a contract like that under consideration in and to the crops raised thereunder; and (2) the legal effect of that portion of the contract giving the landowner the right to take and hold enough of the cropper's share of the crops to secure the repayment of advances made to him. Whatever may be the law in other states on this subject, we regard both questions as definitely settled in this state by the decisions of this court in the *Strangeway*, *Anderson*, *Avery*, and *Wright* cases, *supra*.

1. If it can be said that the contract construed and considered in the case of *Porter v. Chandler*, 27 Minn. 301, 7 N. W. 142, is similar in substance and effect to that involved in those cases, the *Porter* case has been very quietly overruled. In the *Porter* case it was held that the contract there involved was just what it purported to be,—a contract of hiring,—that the absolute ownership of the crops raised thereunder belonged to the landowner, and that

the cropper or hired man had no interest therein which was subject to levy on execution. The controversy in that case was between the cropper and one of his creditors.

In the Strangeway and Anderson cases a doctrine quite contrary to this is expressly laid down. It is distinctly held in those cases that, until a division of the crops, the parties are tenants in common, with the right of the landowner to hold enough of the crops which would on a division belong to the cropper, as surety for advances made, and as further security, as held in the Avery case, that the cropper will not wrongfully dispose of the landowner's share. Those cases do not hold that the landowner is the absolute owner of the crops, as is held in the Porter case, but, on the contrary, expressly lay down the rule that until a division the parties are tenants in common of all crops raised. This is a distinct departure from the Porter case, and in effect, though not expressly, overrules it. But an examination of the contract considered in the Porter case will show that there are substantial differences between it and the contracts involved in the later cases. The contract in the Porter case starts out as follows:

"That the said A. L. Porter, party of the first part, upon the terms and conditions hereinafter specified, hereby hires and employs the aforesaid Henry Linnemann to work, till, and carry on the following described farm."

Neither this language nor its equivalent is found in the contracts considered in the later cases. It also provides for tilling and farming the land by the cropper in a good, farmerlike manner, and, when the grain raised thereon is threshed, that the cropper will deliver the same, and the whole thereof, to the landowner's granary. And

"It is further agreed and distinctly understood by and between the parties to these presents that all the grain, corn, straw, grass, hay, and all other crops and produce of every kind that shall grow or be raised on said farm during the year or season of 1877, shall be the property of the said A. L. Porter, and that all of the said farm land and premises, and every part and parcel thereof, shall be and remain in the possession of the said A. L. Porter, and under his absolute control and supervision, and all the work and labor to be done on said farm during said term shall be done thereon by



the said Henry Linnemann and A. Linnemann according and agreeably to the orders and directions of the said A. L. Porter, and under his direct supervision; and it is further agreed and mutually understood by and between the parties to these presents that in case the parties of the second part shall fail to do the work in the manner and at the time and times herein specified, or fail to perform and fulfil any of the terms and conditions of this agreement, then and in that case they shall forfeit all claims under this agreement, and the said A. L. Porter shall have the right to have, hold, and retain full possession of the said farm and premises, and to complete the work necessary to be done in said premises."

There is no provision in that contract by which the parties agree that "until a division" the crops belong to the landowner. There is no provision that, in case of default in the performance of the contract by the croppers, the landowner shall have the right to enter upon the farm and complete the work, and deduct the expense thereof from the cropper's share of the crops, as in the Strangeway and Anderson cases. But there is a provision that in case of such default the croppers forfeit all rights under the contract.

The contracts involved in the Strangeway and other late cases expressly recognize the right of the cropper to a share of the crop, and provide for a division thereof; but no such recognition is to be found in the Porter contract, nor does it contain a stipulation as to a division at all. For these reasons, we think the contracts are fairly distinguishable. But, if they are not, it is beyond question that the later cases in effect overrule the Porter case. In the Porter case the landowner is held to be the absolute owner of the crops, with no right or interest in the cropper, while in the later cases it is distinctly held that the landowner and cropper are tenants in common. It is not important what a contract may be named or called by the parties. The real intention as expressed in the writing must control. And, as said by this court in the Strangeway case, contracts of this character must be so construed as to give force and effect to the intention of the parties. Under such a construction there is no room for controversy but that the later decisions of this court are correct, and in harmony with the general trend of the later authorities outside the state.

2. Is the contract, in so far as it reserves the title to the crops in the landowner, and the right to take and hold enough of the cropper's share to repay advances made to him, a chattel mortgage? We think this question has also been definitely settled and determined by the decisions of this court.

There can be no question of the right of a tenant in common to mortgage or otherwise sell or dispose of his interest in the common property. *Potts v. Newell*, 22 Minn. 561. And, if he may sell or mortgage his interest, the same may be reached on execution or attachment. The question whether a contract like that here involved is in effect a chattel mortgage came squarely before this court in *Wright v. Larson*, 51 Minn. 322, 53 N. W. 712; and it was there distinctly held that in so far as it created a lien, and reserved in the landowner the ownership of the crops, and the right to take and hold the cropper's share as security for the payment of advances and indebtedness due from him, it was in legal effect a chattel mortgage, and void as to subsequent mortgagees and purchasers in good faith, unless filed. The case of *Merrill v. Ressler*, 37 Minn. 82, 33 N. W. 117, is very similar to this one. It is there held that a clause in a lease of real estate reserving to the lessor a lien for the rent on the goods and chattels of the lessee placed on the demised premises is in its nature and effect a chattel mortgage, at least in equity, and should be filed. *Gilfillan, C. J.*, speaking for the court in that case, said, at page 85:

"A chattel mortgage is a transfer of the title as security, and strictly, at law, must contain words of conveyance. But so strongly are courts inclined to so construe the agreements of parties as to make them effectual, that no formal words of transfer, and no particular form of instrument, are required to make an agreement operate as a mortgage."

In *Strangeway v. Eisenman*, 68 Minn. 395, this court said, at page 395:

"The provision that until division the title and possession should be and remain in the plaintiff, if given the effects claimed for it by him, would be as repugnant to both the letter and spirit of the other provisions in the contract as would be a provision that defendant should have no right to enter upon the premises at all, and

that, if he did so, he would be a trespasser. The only effect that can be given to that provision consistent with the general purpose, as well as the other express provisions, of the contract, is that plaintiff should have the title, and, when necessary, the right to the possession, of the crops, as security for the performance of the terms of the contract by the defendant. Any other construction would nullify the entire contract, and render impossible its performance by the defendant."

In the case of *Anderson v. Liston*, 69 Minn. 82, this court sums up the law on this subject as follows, at page 84:

"So far as it was security for 'advances' and 'indebtedness,' it may be conceded, as the law probably is, that the contract was in effect a chattel mortgage, and was required to be filed, as to subsequent bona fide purchasers and as to creditors."

It is contended that the precise question was not presented in, or necessary to a decision of, that case; but the question was squarely presented in the *Wright* and *Merrill* cases, *supra*, and squarely decided, and the *Anderson* case is but a statement of the law as there established and laid down. To sustain the position of respondent, we must overrule all these cases, and return to, resurrect, and reannounce as the law, the rule laid down in the *Porter* case. The nature of the questions will not warrant us in doing so. The lawyers generally have acted on these decisions, accepted them as the law of the state, and proper respect for consistency requires that we adhere to them.

We have gone somewhat extensively into the questions, for the reason that we are not fully agreed as to the nature and extent of former decisions of the court. We have considered and examined all the cases that have come to our notice wherein similar contracts have been involved, and the conclusion reached is in conformity with the law as previously declared by this court. The result is that, as plaintiff's farm contract under which she claims the wheat was not filed, she has no right to the wheat as against the defendants.

Order reversed.

COLLINS, J. (dissenting).

The landowner may easily protect himself as to present indebt-

edness and future advances by filing his contract in the proper office, and, were this the only effect of the prevailing opinion in this case, I should not dissent. But there is a question deeper and of more consequence than this, which is foreclosed by the conclusion that such a contract is nothing more than a chattel mortgage, and must be filed as such; and it is this question which influences me to think the result altogether wrong. Nor can I agree with the majority in the assertion that such a contract is in effect a chattel mortgage, and must be filed. Nor, so far as I have observed, has that been the prevailing opinion among the members of the bar. At the risk of repetition, let me refer to the decisions on which the claim is based that the primary question has already been determined, namely, *Porter v. Chandler*, 27 Minn. 301, 7 N. W. 142; *Wright v. Larson*, 51 Minn. 321, 53 N. W. 712; *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617; and *Avery v. Stewart*, 75 Minn. 106, 77 N. W. 560.

*Porter v. Chandler* was litigated in the court below and in this court, by defendant, upon the claim that in effect the contract there considered was a chattel mortgage, and by its terms constituted the men who worked the plaintiff's farm part owners of the crop raised, before a division thereof. This will be seen on an examination of the paper book on file in the office of the clerk of this court, and the brief of defendant's counsel in the state library. The dispute was between the owner of the land and an attaching creditor of the men who worked the farm. The contract is to be found in the paper book, and, in my judgment, does not differ in any essential feature from that now before us. It purports to be a contract for hiring the Linnemanns to till and cultivate plaintiff's farm for a single season; they to receive as payment a part of the crop. It contained provisions as to details similar to those found in the present contract. Porter was to remain the owner and in possession of all crops, and at the end of the season was to compensate the Linnemanns for their services by delivering to them one-half of the crop raised; excepting and deducting therefrom all claims held by him against these men on account of advances made, and all other matters of indebtedness due from them.

By the contract now in question, Milbury was to remain the

owner and in possession of all crops until a division was made. Lutes was to be compensated for his work and labor by receiving a share of the crops, and Milbury was to hold and retain enough of the crops raised to repay all advances made and all other indebtedness due and owing from Lutes. The Porter contract was no more one for hiring than was that now before us. The real character of these agreements was the same, and this is the test when comparing them to ascertain their legal effect. Neither one is to be construed by the label which one party or the other chose to attach to his particular instrument. The question now before us was presented and argued in the Porter case, and it was with reference to the contention that the contract should have been filed with the proper town clerk that the court, in the opinion, stated that the exclusive property in the crops was in Porter until he should set apart for the Linnemanns the amount they might be entitled to in payment of the balance due at the time specified, and that defendants' request to charge the jury was wrong because it assumed that the contract was in effect a chattel mortgage. While the question now under consideration was not expressly and in exact terms decided in that case, I am of the opinion that it was really disposed of. If that case is to be considered an authority, it sustains the order appealed from.

It is further to be noticed that the Porter case was referred to in the one next to be mentioned (*Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617), without an intimation that it was erroneous in any respect. In fact, the suggestion is to the contrary. In the *Strangeway* case the controversy was between the owner of the farm and the party with whom he had contracted to till and cultivate it. The rights of third parties were not considered.

The next case is that of *Anderson v. Liston*, 69 Minn. 82, 72 N. W. 52; the dispute arising between the owner of the farm, who had filed his contract, and the mortgagee of the other party, whose mortgage was filed subsequent to the contract. There was a remark made in that opinion concerning the necessity of filing contracts of this character, to which reference will be made later.

This brings me to the case last mentioned (*Avery v. Stewart*, 75 Minn. 106, 77 N. W. 560), in which a contract similar to those con-

sidered in *Strangeway v. Eisenman* and *Anderson v. Liston*, and to that in the case at bar, was passed upon in a contest between the assignee of the owner of the farm, and a person who had purchased a part of the crop from the other party. It did not appear whether or not the contract had been filed, nor was that point considered. The court held that from the evidence it conclusively appeared that there had been no division of the crop when the sale was made, and then said, at page 108:

"In *Anderson v. Liston* \* \* \* we held that while the owner and occupier of the land were, under such a contract, tenants in common of the crops, the title to the crops remained in the owner as security for the performance of the contract on the part of the occupier; and it may be added that, until division, the title to the whole remains in the owner as security that his own share will not be wrongfully withheld from him by the occupier."

As intimated in the last few lines of this quotation, the conclusion was that until division the title to the crops remained in the owner of the land. It would seem to follow from the decisions to which special reference has been made, to the effect that the "cropper's" possession or control is only for the purpose of enabling him to cultivate and harvest the crops, and goes no further, and that until a division he cannot sell a part of the products, because the title to all remains in the owner of the farm, as security that such owner will not be wrongfully deprived of his share. There may not be perfect harmony in some things which have been said in the opinions in these four cases, but in none except *Anderson v. Liston* has it been intimated that a farm contract of the character of the one now before us had to be filed in accordance with the provisions of the statute in order to protect the owner of the farm, as against creditors and subsequent purchasers or mortgagees in good faith of the cropper. It was said in the *Anderson* case that

"It may be conceded, as the law probably is, that the contract was in effect a chattel mortgage, and was required to be filed, as to subsequent bona fide purchasers and as to creditors";

But this was an obiter remark, wholly unnecessary to a determination of the cause. Of course, it is not binding upon the court.

It is well settled, taking the cases specially referred to as a whole, that, as between themselves, the parties to a contract containing the provisions found in the one now presented are tenants in common of the crop prior to a division, each having certain rights therein. The cropper is entitled to such possession and control as will enable him properly to perform the required labor, and this is the extent of his right. He may till, cultivate, harvest, and thresh as he has agreed and is obliged to do, but he has nothing which he can sell or dispose of. If this be so, I fail to see how his mortgage can become effective, or by what authority his share in the crops can be seized at the instance of a creditor, until there has been an actual division.

There is some diversity of opinion in other jurisdictions over this question. In a majority of the courts of last resort it is held that where it is agreed in the contract that the legal title and possession of the crops shall remain in the owner of the land until the other party has fully performed, and there has been a division, the reservation or contract does not operate as a mortgage or mere security to the owner. The legal possession of the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper is limited, and for a special, necessary purpose. Such possession is merely incident to his right and duty to plant, till, cultivate, and gather, and for these purposes only to control the soil and crops. 4 Am. & Eng. Enc. 895, and cases cited; 8 Am. & Eng. Enc. (2d Ed.) 323-325, and citations. And there seems to be no difference of opinion in the courts wherein croppers and landowners are not regarded as tenants in common for all purposes. 4 Am. & Eng. Enc. 899, and cases cited in notes.

I have referred to what was said in the Anderson case. That was purely obiter, and should be excluded from any consideration as an authority. It is to be remarked, however, that the opinion in that case was written by the same member of the court who wrote the opinion in *Wright v. Larson*, *supra*, on which the majority place great reliance. But it clearly appears that the question there was not as to the necessity of filing the farm contract in order to protect the landowner. Another question was the one

involved, was the only one necessary to decide, and was the only one mentioned in the syllabus prepared by the writer of the opinion. That it was not regarded as authority on the proposition now contended for is also evidenced by the fact that four years later, in *Anderson v. Liston*, the same writer seems to have regarded the question as unsettled. From the statement of facts in the *Wright* case it appears that the chattel mortgage under which plaintiff claimed as against the intervenor (landowner) was executed before the grain was harvested, but that when the plaintiff asserted his rights thereunder, by bringing an action of replevin, the crop had been divided by and between the landowner and the cropper, the latter being in possession of his share. The former had surrendered possession, and with it the title previously held under the contract. The mortgage given to plaintiff by the cropper, which before that time had been a float, simply, not attaching definitely to any property or rights until the contract had been fully performed, then took effect; and this is what controlled that decision. A glance at the briefs will show that the counsel for the landowner did not seriously contend that it was unnecessary to file the contract to protect his client fully before division, while counsel for the mortgagee disposed of the matter by saying that

"A careful reading of the \* \* \* contract will show that \* \* \* it amounts to nothing more than a chattel mortgage upon the defendant's share of the grain after division."

Counsel were quite right, and I think no court would differ with them. Taking the facts and circumstances into consideration, I am of the opinion that the *Wright* case should not be held as absolutely disposing of the question. I can say that at no time within the twelve years of my service in this court has there been an understanding among its members to the effect now claimed for the decisions. But I said at the outset that it was not important what we held on the abstract proposition, and that, if it were not for a question of greater significance and consequence, I should not dissent. I refer to what must be the inevitable result of the conclusion reached, namely, that, as it is held that such a contract is nothing more than a chattel mortgage, the landowner is powerless



to prevent a sale by the cropper, or a seizure of the crop by a mortgagee, or officer of the law acting in behalf of a creditor, as soon as the seed is in the ground, and the substitution, through such seizure, of a new cropper in lieu of the one he has selected. The person with whom the owner has contracted, perhaps for personal fitness and ability, would then be excluded from the premises, and the self-substituted cropper remain in control. This is the logic of the decision. The basis thereof is that the landowner and the cropper are tenants in common. If so, the latter may sell, or incumber, or a creditor may act through an officer; for, as stated in the prevailing opinion, citing *Potts v. Newell*, 22 Minn. 561,

"There can be no question of a right of a tenant in common to mortgage or otherwise sell or dispose of his interest in the common property."

I think this court should hesitate long—whether the decision is rested upon the ground of *stare decisis* or on some other doctrine—before holding that the contract of the man who owns the land, and presumptively is the owner of a crop growing thereon, and a cropper whom he has selected to till and cultivate the same, shall be thrust aside, that a purchaser or a mortgagee or a sheriff may step into the cropper's shoes and carry on the land. That is just what was done here. Before the grain was stacked, the sheriff took possession, excluded the cropper, defied the owner, stacked and threshed the grain, dividing it at his leisure and as he willed. It is not to be forgotten that the landowner cannot protect himself from such an outrage by filing his contract. Filing will not prevent a seizure of the crop and the dispossession of the cropper, if a mortgagee or a creditor chooses to annoy either or both of the parties. Nor is this all. If the contract be filed, a subsequent mortgagee may, under the doctrine of the *Anderson* case, limit the credit to be given under such contract, and stop all future advances, by giving the landowner actual notice of his mortgage. The owner is then placed between the mortgagee, who gives him notice, and the cropper, who can have very little further interest in the crop; the result to be expected being an abandonment of the crop, and the contract by the latter.

For the reasons stated, and the very serious consequences which it seems to me will flow from the conclusion reached by the majority, I dissent. I am authorized to say that Chief Justice START concurs in these views.

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CHARLES V. VASSAU and Another v. JAMES CAMPBELL and Another.

February 13, 1900.

Nos. 11,849—(40).

**Appeal—Certificate of Trial Judge.**

The certificate of the trial judge upon the return of a record into this court is not necessarily conclusive, but resort may be had to the entire record to ascertain whether it contains all the evidence.

**Same—All the Evidence.**

A certificate of the trial judge that the case is "a true statement of the proceedings, \* \* \* and the same are hereby made the settled case," *held*, in connection with the record returned herein, to show that the whole evidence is before this court for review.

**Sale of Cattle of Certain Age—Tender.**

Where a contract provides that the tender of a bunch of cattle of a certain age shall be made at a specified time, an offer of cattle older than the specified age, though perhaps of more value, will not satisfy the terms of such contract.

**Same—Fair Average.**

Where it is provided that a bunch of cattle of average quality shall be tendered between a maximum and minimum condition, at least more than one-fourth should be above the minimum grade, to comply with the terms of the contract.

**Verdict not Sustained by Evidence.**

The evidence in this case is insufficient to sustain the verdict.

Action in the district court for Polk county to recover \$507.50 damages for breach of contract. The case was tried before Watts, J., and a jury, which rendered a verdict in favor of defendants. From an order denying a motion for a new trial, plaintiffs appealed. Reversed.

*Van R. Brown*, for appellants.

*H. Steenerson*, *W. E. Rowe* and *B. S. Bennett*, for respondents.

LOVELY, J.

This action is for damages for the alleged failure by defendants to deliver to the plaintiffs fifty head of "good, average cattle,"—yearlings not less than ten months old, raised in the Thirteen Towns and vicinity,—according to the terms of a written contract, under which the plaintiffs had paid \$250, and afterwards had paid \$7.50 as a consideration for a short extension. The defense was that at the time agreed upon for delivery of the cattle the defendants properly tendered a bunch of cattle that complied with the terms of the contract, and that plaintiffs refused to accept them, which was denied by plaintiffs, who contended that the cattle were not of the quality bargained for. The case was tried before a jury, who returned a verdict for defendants. Upon motion therefor, the trial court refused a new trial, and plaintiffs appeal from the order denying the same.

The only assignment of error which we can consider involves the sufficiency of the evidence to sustain the verdict, and defendants' counsel at the outset deny that the certificate of the trial court upon the return warrants this inquiry, for the alleged reason that it does not show that all the evidence is transmitted to this court for review. The objection is predicated on the certificate of the trial judge, which is in the following words:

I hereby certify that the "hereto attached proposed case and amendments allowed as aforesaid are a true statement of the proceedings and evidence in the above entitled action, and the same are hereby made the settled case herein."

The point made is that the certificate of the judge does not in so many words declare that all the evidence is included in the case. We hold that it must appear that all the evidence is returned to enable us to review its sufficiency to sustain the verdict, but it does not follow that the judge's certificate is necessarily conclusive as to that fact. *Acker Post v. Carver*, 23 Minn. 567; *Coleman v. Reiersen*, 36 Minn. 222, 30 N. W. 811. The whole record may be considered for the purpose of ascertaining whether the evidence

upon which the jury acted is before the court. And we think, from our examination, this record,—which contains apparently a full transcript from the stenographer's notes,—as a proposed case, with amendments covering the entire range of proof therein, which was acted upon and settled by the trial court, sufficiently shows that all the evidence submitted to the jury on the trial is before us, and that we are authorized to review the same. *Leggett v. Grimmett*, 36 Ark. 496, 500; *Robinson v. Hartridge*, 13 Fla. 501; *Ironwood v. Harrison*, 75 Mich. 197, 42 N. W. 808.

We are quite clear that the evidence in two important respects does not sustain the verdict. The contract provided as follows:

"The parties of the first part agree to sell and deliver to said second parties fifty head or more of yearling cattle, to be not less than ten months old at the time of delivery. \* \* \* Said cattle may consist of heifers and steers, and are to be of good average cattle of such age raised in the Thirteen Towns" [a well-known locality of that country].

It was shown by the evidence that among dealers in cattle in that vicinity the term "yearling" had a well-defined meaning, viz., cattle from ten months to eighteen months of age. It must be held that the parties contracted with reference to this term as generally understood, and, so construed, the defendants agreed to deliver at least fifty head of cattle—steers and heifers—averaging in age from ten to eighteen months. A bunch of fifty cattle was in fact tendered, but less than a fourth were over ten months old, and six of these were bulls. This would not be a compliance with the terms of the contract. So many ten-months cattle, but little better than calves, did not constitute in the whole bunch a fair average; and as further provided by the contract, and held by the court in the charge, the furnishing of the bulls instead of heifers or steers did not meet the requisites of the contract either. It is true that the defendants offered six two year olds in the place of the bulls, but the plaintiffs might have had their own reasons for demanding a strict compliance with the contract, and they had a right to insist on the same against a different compliance in any respect, which defendants were trying to make. *Bixby v. Wilkinson*, 25 Minn. 481.

The evidence leads very strongly to the view that defendants, who had received \$257.50 on the contract, were perfectly willing that plaintiffs should refuse to accept the bunch of cattle, and were not really in good faith disposed to render more than a bare technical compliance with its terms, and there is not sufficient proof that they did even this. The defendants themselves admitted that there were only fifty cattle in the bunch they tendered, of which six were bulls, and described as stated above; but afterwards one witness, who saw the herd which was said to have been tendered three days after such tender, thought there were from fifty to seventy-five head, and the theory of defendants that this evidence sustains the verdict because there were more than the number required to make the tender good, is against the positive admissions of defendants themselves as to the number in the bunch at the time of the tender. This is even less than a scintilla of evidence, and cannot materialize into the shadow of proof. We cannot regard it of any value whatever in the case.

The order of the court below is set aside, and a new trial granted.

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HARRIET G. F. MILTON v. ALBERT N. JOHNSON and Others.

February 13, 1900.

Nos. 11,923—(207).

**Collection by Subagent—Application to Payment of Debt of Principal Agent.**

A subagent intrusted with the collection of a debt due from a third party may not apply the proceeds of the same to the payment of a claim due himself from the principal agent from whom it came, knowing that it belongs to such party, or in any way divert the funds so collected from a quick and speedy transmission to the owner thereof.

**Same—Liability of Subagent to Principal.**

Where the principal agent has forwarded collections to a subagent, and directs the latter to make any use of the funds other than the usual one of their application to the payment of the debt to the principal, and such subagent complies with such direction, he becomes responsible therefor to the principal.

Action in the district court for Hennepin county by plaintiff, as executrix of the will of George R. Milton, deceased, against defendants, copartners under the firm name of Swift County Bank, to recover \$1,035 collected by defendants, with interest. The case was tried before Elliott, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendants appealed. Affirmed.

*S. H. Hudson and Daniel Fish*, for appellants.

*Kitchel, Cohen & Shaw*, for respondent.

LOVELY, J.

The defendants were engaged in the banking business at Benson, in this state, under the partnership name of the Swift County Bank, and, as such firm, had considerable to do with A. F. & L. E. Kelley, loan agents of Minneapolis. The Kelleys became insolvent and made an assignment in September, 1896, previous to which time the bank at Benson had acted as their subagent; receiving applications for loans, which the Kelleys took up with funds which belonged to themselves, or to the third parties for whom they acted. The bank also collected from time to time both principal and interest due upon loans for the Kelleys, and remitted the proceeds to them. Several years before the assignment, George R. Milton made a loan of \$1,000 to one Alsaker, who lived near Benson. This loan was secured by mortgage. Milton, the mortgagee, died, and plaintiff was duly appointed executrix of his will. In April, 1896, afterwards, at the request of the defendant bank, the Kelleys procured the note and mortgage, which had still a year to run, and forwarded the same, with a satisfaction, to the bank for collection. The Kelleys had full authority from plaintiff to collect this debt, and to invest the proceeds in another loan. The defendant bank collected the note and one interest coupon, amounting to \$1,035, and also collected interest due on previous coupons amounting to \$192.14, which sum had previously, when due, been sent to the plaintiff by the Kelleys, as if it had been actually collected. Of this last proceeding, defendant bank knew nothing.

At the time the money was collected on the Milton note and mortgage, the Kelleys were indebted to the defendant bank in the

sum of \$5,000 on a demand note which they had given in the previous December, and upon which payment was demanded in the following January, when the Kelleys directed the defendant to pay it out of "collections" coming to them as loan agents through the bank. In May, 1896, the defendant, as subagent of the Kelleys, collected eleven other notes, running to third parties, which had been placed with the bank for collection, and had in its hands after receiving the money on the Alsaker note the round sum of \$2,532. Of this money so collected it remitted \$32 to the Kelleys, and credited \$2,500 on the note of \$5,000 running from the Kelleys to the bank. The Kelleys accepted the remittance in full payment of the collections to that extent, including the Alsaker note and interest due on the last coupon. The bank kept an accurate account with the Kelleys on its books, in which it credited all moneys sent it for investment, and against which it charged all disbursements made at their instance, including the deal last referred to. The Kelleys never remitted the money so collected upon the Alsaker note, or an equivalent sum, to the plaintiff; and some time after their insolvency, when the facts above stated became known, this suit was commenced to recover of defendants the amount due to the plaintiff in that transaction.

The case was tried by the court, who found, as an essential fact, in substance that

At the time of making the said Alsaker note and mortgage, and at all the times thereafter, the firm of A. F. & L. E. Kelley had no interest whatsoever in the said note and mortgage [or coupon], \* \* \* but that, at the time of making the said Alsaker note and mortgage, defendants knew that the said George R. Milton was the sole owner thereof, and at the time of the collection of said sum of \$1,035 said defendants knew that plaintiff herein was then the sole owner of the said Alsaker note and mortgage, and the said July, 1896, interest coupon.

The court also found the other facts which we have stated above at length and in detail, and held that the plaintiff was entitled to recover of the bank the money received on the Alsaker note, which the bank had applied in payment of the debt due it from the Kelleys. Defendants moved for a new trial, which was denied, from which order this appeal is taken.

We have no doubt that the evidence is sufficient to support the findings of the trial court. It was, among other things, established that, before the Alsaker note was due, the bank requested that the note be sent to it (through the Kelleys), in order to pay it and replace it by another loan upon the same land. The unindorsed note, with a satisfaction from the plaintiff, wherein the fiduciary character of the Kelleys' relation and duties appeared, was forwarded, and might well have furnished the knowledge of the ownership of the property which the trial court held to be in plaintiff. Upon well-understood principles, the facts thus found must necessarily be the basis of every legal conclusion we arrive at in this review; and the salient fact that defendants knew that the plaintiff owned the Alsaker note and mortgage, and the money collected thereon, when they appropriated it to pay the debt of the Kelleys to the bank, cannot be ignored by us, with its legal inferences.

It was zealously contended by the able counsel for defendants that, in view of the business methods between the Kelleys and the bank, this transaction was no different in character than if the bank had forwarded the money to the Kelleys, and the Kelleys had immediately returned it, to be applied on their note to the bank. As often occurs in argument by illustration, the supposed is not the real case. It lacks one element—a knowledge by the bank of the misappropriation—to complete the similitude. Again, it was asked with much plausibility whether the bank should have remitted the money of Mrs. Milton to her direct, to exonerate it. Of course, this was not the duty of the bank; but we doubt not that it was the duty of the bank to remit the money to the Kelleys, which was as far as the bank could go under its trust relations. But, instead of this, it kept the money to pay itself a debt due from plaintiff's agents; and there is little that affects this view in the suggestion that defendant bank, in the absence of proof that amounted to guilty knowledge or scienter, had a right to assume that the Kelleys would settle fairly with their principal when they closed their account with her, for the fact remains that neither the bank nor the Kelleys had the legal right to the money; it belonged to neither of them; it was the property of plaintiff; and it was, in the legal sense that follows, misappropriated and withheld in fact



by the Kelleys, who were aided by the bank, with actual knowledge of the true ownership.

There was, of course, no privity between plaintiff and the bank, except such as arises from the trust relation; but this relation was sufficient to create an obligation on the part of the bank to deal with plaintiff's money as its principals, the Kelleys, were required to deal with it and its owner. There was a privity between the bank and the Kelleys, and the bank must, by legal intendment, be charged with knowledge of what the Kelleys did, for it was the combined acts of both by which plaintiff was deprived of her property. It is the knowledge of the ownership of this money, as found by the court, which is the controlling element in determining the liability of the defendants, and subjects the bank to an action for money had and received, upon the rule that, where one has the money of another which he has no right to retain, the law implies a promise that he will repay it to the true owner. *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42. The duties between the various parties in this transaction were confidential, and imposed trust obligations, which could be performed in only one way, viz. by promptly transmitting to the owner her property by the Kelleys; and in such cases

"The trustee's application of trust funds to the payment of his own debts or in any way to his own use, is highly improper. A creditor receiving trust funds thus misapplied, or any one coming into the possession of trust property, with a knowledge of its character, stands in the trustee's shoes, and must account as trustee for everything so received." 27 Am. & Eng. Enc. 265. *Perry, Trusts*, §§ 211-298.

This rule is most rigidly enforced; for the law is solicitous to guard the relation of principal and agent in control of the trust funds in the remotest channels through which they flow, and it will not allow either the agent or subagent to assume for a moment that his principal's property is for his own use. Such improper assumptions in such dealings are often followed by loss to the principal, and work business and moral ruin to the agent. It therefore must be regarded as a correct principle of law that the least turning aside of the funds held in trust by the agent or subagent is

legally a wrongful act, and subjects any party who aids in any such diversion to full responsibility. If there is anything in the authorities cited by counsel for appellants that is opposed to these views, we cannot coincide with such doctrine; for the rule we state in its application to this case is not new in this court. It was sententiously stated by Gilfillan, C. J., in *Lenthold v. Fairchild*, 35 Minn. 99, 110, as follows (where the principle involved was the same as here):

“In a case where the agent or servant not only knows that disposing of the property is a wrong, but to some extent directs as well as performs it, he is to be deemed a party to the wrong.”

It is elementary that a party cannot say that he does not know that an act is wrong, when its legal effect is obvious. In such case he must recognize the possible connection of his acts, and the probable legal effects that may follow. He must take no chances, with the expectation that courts will look complacently upon his misdirection of the funds trusted to his care by the beneficiary, and, being so presumed to intend the consequences of his acts, must be held responsible pecuniarily for the results that follow, although, as in the case of these defendants, his intentions may be just and honorable.

The order appealed from is affirmed.

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LINCOLN DREW v. M. C. TIFFT.

February 14, 1900.

Nos. 11,932—(212).

### **Equality of Taxation—Inheritance Tax.**

The mandate of equality of taxation, as near as may be, of section 1, article 9, of the state constitution, applies to inheritance taxes exactly as it does to taxes on property, except as otherwise expressly provided in the last proviso to the section, relating to an inheritance tax law.

### **Laws 1897, c. 293, Unconstitutional.**

Laws 1897, c. 293, which attempts to lay an inheritance tax, is unconstitutional for the reasons: (a) It excludes from its operation real prop-

erty, and lays the tax upon inheritances of personal property alone; (b) it exempts from its operation persons and corporations whose property is exempt by law from taxation; (c) it allows a larger exemption to lineal heirs than to collaterals, and does not lay the tax on the excess of the value of the property received above a uniform exempted sum.

#### **Lineal Heirs and Collateral Heirs.**

The statute is not unconstitutional because it taxes collateral heirs and distributees at a higher rate than lineals, for the constitution expressly authorizes such graduation of the tax.

Petition in the district court for McLeod county for a writ of mandamus commanding M. C. Tift, judge of the probate court of that county, to proceed with the distribution of the estate of George Drew, deceased, without requiring payment of the so-called inheritance or transfer tax provided for by Laws 1897, c. 293, and to make and enter the final decree requisite therefor. From an order, Cadwell, J., denying a motion for a peremptory writ, petitioner appealed. Reversed.

*Haynes & Chase*, for appellant.

*Ripley & Brennan*, by consent, filed a brief in behalf of appellant.

An inheritance or succession tax may be defined as an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the state. *State v. Switzler*, 143 Mo. 287, 328. It is not a tax on the property, but is in the nature of an excise on the privilege of receiving it under the laws of the state by way of devise or inheritance. To prevent evasions gifts created by instruments *inter vivos*, to take effect upon the death of the maker, are included. The state cannot impose unreasonable and unequal conditions on the privilege of enjoying a right given by general laws. Subject to this rule the power of the legislature over taxation is practically unlimited, except so far as restrained by constitution. *Sanborn v. Commissioners*, 9 Minn. 258 (273); *Eyre v. Jacob*, 14 Grat. 422.

Nearly all states hold that inheritance taxes, properly speaking, are not imposed on property, but on the privilege of receiving property by inheritance or devise, and that as taxes on property they cannot be sustained. *Minot v. Winthrop*, 162 Mass. 113;

*Magoun v. Illinois T. & S. Bank*, 170 U. S. 283; *Kochersperger v. Drake*, 167 Ill. 122; *In re Wilmerding*, 117 Cal. 281; *State v. Ferris*, 53 Oh. St. 314; *Wallace v. Myers*, 38 Fed. 134; *Dos Passos, Inher. Tax* (2d Ed.) § 8; *Gelsthorpe v. Furnell*, 20 Mont. 299.

The intangible nature of this tax, as being one neither on the property nor on the person receiving it, but on the abstract right or privilege of succeeding to the property by will or inheritance, is shown by the fact that legacies to the United States are subject to state succession taxes, though states cannot tax the United States. *U. S. v. Perkins*, 163 U. S. 625; *In re Merriam*, 141 N. Y. 479; *Dos Passos, Inher. Tax* (2d Ed.) § 28. So likewise legacies of government bonds which are by law exempt from taxation are subject to inheritance taxes. *In re Sherman*, 153 N. Y. 1; *Wallace v. Myers, supra*; *Strode v. Com.*, 52 Pa. St. 181; *Dos Passos, Inher. Tax*, § 27. In *State v. Gorman*, 40 Minn. 232 (declaring Laws 1885, c. 103, invalid), the tax was held to be one on the property of defendant. See *State v. Mann*, 76 Wis. 469; *State v. Switzler, supra*. In view of *State v. Gorman, supra*, Laws 1897, c. 293, was enacted. This act was copied from New York, whose constitution imposes no restriction on the taxing power.

The act is invalid because it exempts legacies to charitable corporations entirely, and partially exempts those to near relatives. Exemptions from taxation are strictly construed, and a general exemption from taxation has no reference to assessments for local improvements, nor to excise and similar taxes. 1 *Desty, Taxn.* 121; *Cooley, Taxn.* 207; *Roosevelt v. Mayor*, 84 N. Y. 108; *Boston v. Mayor*, 116 Mass. 181; *Sheehan v. Good Samaritan*, 50 Mo. 155; 25 *Am. & Eng. Enc.* 160; *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469. See *Washburn M. O. Asylum v. State*, 73 Minn. 343; *Ramsey County v. Macalester College*, 51 Minn. 437; *Dos Passos, Inher. Tax*, § 35; 25 *Am. & Eng. Enc.* 158; *Miller's Exr. v. Com.*, 27 *Grat.* 110; *In re Vassar's Will*, 127 N. Y. 1.

The act is invalid because it provides for a tax on transfers of personal property only; and because it provides that the entire inheritance, if of a certain amount, or in excess thereof, shall be taxed; and because it provides for two fixed amounts depending on the relationship of the parties. Regardless of the amendment of

1894, the requirements of Const. art. 9, § 1, as to uniformity are broad enough to include inheritance taxes. Even if the original provision as to uniformity did not apply to inheritance taxes, the adoption of the amendment as a proviso to this section must be held to extend its commands to this class of taxes. *Endlich*, *Interp. Stat.* § 186. See *Brown v. Maryland*, 12 Wheat. 419; *Voorhees v. U. S. Bank*, 10 Pet. 449; *Gibbons v. Ogden*, 9 Wheat. 1; *Noonan v. City of Stillwater*, 33 Minn. 198. An affirmative grant of power, where the legislature would otherwise have more extensive powers than those purporting to be granted, is a denial by implication of any power in excess of the terms of the grant. *State v. Holman*, 58 Minn. 219; *State v. Clough*, 23 Minn. 17; *State v. Gorton*, 33 Minn. 345; *Cooley*, *Const. Lim.* (5th Ed.) § 64; *Lowe v. Com.*, 3 Metc. (Ky.) 237; *Durousseau v. U. S.*, 6 Cranch, 307, 312; *State v. Daugherty*, 5 Tex. 1; *U. S. v. More*, 3 Cranch, 159, 172. Taxes, whether on indebtedness or otherwise, must be uniform. *State v. District Court of Hennepin Co.*, 33 Minn. 235; *State v. Pioneer S. & L. Co.*, 63 Minn. 80; *City of Faribault v. Misener*, 20 Minn. 347 (396).

Placing the construction of the supreme court of New York on the act, it provides that taxes on legacies of less than \$10,000 under section 2 shall be taxed if the entire amount of taxable legacies is over \$10,000, while a legacy of the same amount would not be taxed if the entire amount of taxable legacies was under that amount; and the same in respect of section 1, changing the amounts. *In re Hoffman*, 143 N. Y. 327; *In re Westurn*, 152 N. Y. 93.

*Cross, Hicks, Carleton & Cross*, and *Keith, Evans, Thompson & Fairchild*, by consent, also filed a brief attacking the validity of Laws 1897, c. 293.

*W. B. Douglas*, Attorney General, and *F. R. Allen*, County Attorney for McLeod county, for respondent.

Enactments like Laws 1897, c. 293, impose a tax on the privilege of receiving property by inheritance or devise, and not on property itself. The right to take by devise or descent is the creature of the law and not a natural right. The usual limitation requiring uni-

formity in taxes on property does not apply. *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 293; *Mager v. Grima*, 8 How. 490; *Dos Passos, Inher. Tax*, § 8; *Eyre v. Jacob*, 14 Grat. 422; *Kochersperger v. Drake*, 167 Ill. 122; *In re Wilmerding*, 117 Cal. 281; *Gelsthorpe v. Furnell*, 20 Mont. 299; *In re Hoffman*, 143 N. Y. 327; *In re Bronson*, 150 N. Y. 1; *Wallace v. Myers*, 38 Fed. 184; *Minot v. Winthrop*, 162 Mass. 113; *State v. Hamlin*, 86 Me. 495; *Strode v. Com.*, 52 Pa. St. 181, 183; *Clymer v. Com.*, 52 Pa. St. 189; *Com. v. Herman*, 16 Wkly. Notes Cas. 210; *State v. Dalrymple*, 70 Md. 294; *Tyson v. State*, 28 Md. 577. Other statutes somewhat in the form of impositions of taxes on inheritances, but by their terms clearly imposing taxes on the estates of deceased persons, as distinguished from the net amount of property inherited or devised, have been held unconstitutional, sometimes because the statute provided for double taxation, but generally as in violation of the rule of uniformity. This class of statutes is clearly distinguishable from that to which chapter 293 belongs. *State v. Gorman*, 40 Minn. 232; *State v. Mann*, 76 Wis. 469; *State v. Switzler*, 143 Mo. 287, 331. A third class of cases has arisen in which certain special restrictions in the constitutions of various states have been decided to operate as limitations on the exercise of this power. *Curry v. Spencer*, 61 N. H. 624; *State v. Ferris*, 53 Oh. St. 314. *State v. Ferris* was determined by a divided court and the reasoning is unsatisfactory. Both cases were distinguished in *Magoun v. Illinois T. & S. Bank*, *supra*, and the court comments upon *Curry v. Spencer*, as being "extreme."

In all cases in which this court has considered the limitations imposed by article 9, § 11, as originally adopted, only questions involving taxes on property have been involved. *Noonan v. City of Stillwater*, 33 Minn. 198, 201; *Sanborn v. Commrs. Rice Co.*, 9 Minn. 258 (273); *Comer v. Folsom*, 13 Minn. 205 (219). Impositions in the form of taxes on auctioneers, draymen, showmen, and sellers of intoxicating liquor have never been subject to the rule of uniformity, and such impositions (though as much taxes on privileges as is the charge or impost in the name of a tax on the right of succession) are treated as without the limitations of section 1. The right of the state to control inheritances and to designate the class of persons who inherit has always been conceded. *McCormick v.*

Sullivant, 10 Wheat. 202; *Mager v. Grima*, supra; *U. S. v. Perkins*, 163 U. S. 625. The right of the government in its sovereign capacity to control inheritances has existed for centuries both in England and in France, and impositions of the various states on the succession of estates have never been classed as taxes. *Magoun v. Illinois T. & S. Bank*, supra; *Dos Passos, Inher. Tax*, § 23. The exercise of this power by the legislature does not deprive any person of a right, but it is the granting by the state in its sovereign capacity of a privilege to receive on payment of a limited sum. Such an impost, by whatever name it may be called, is not a tax, any more than an ordinary license fee; and hence the rule of uniformity does not apply. This tax is in the nature of an impost. *Scholey v. Rew*, 23 Wall. 331; *State v. Hamlin*, supra; *In re Wilmerding*, supra; *In re McPherson*, 104 N. Y. 306. See *Wallace v. Myers*, supra; *In re Sherman*, 153 N. Y. 1; *U. S. v. Perkins*, supra. Following the construction of the New York courts (*In re Hoffman*, supra; *In re McPherson*, supra) chapter 293 should not be construed as imposing a tax within the meaning of the rule requiring uniformity.

Assuming that article 9, § 1, requires substantial equality to be aimed at in all matters of taxation, the amendment adopted in 1894 provides an exception in matters of inheritance or succession taxes. The general right to make classifications, based on substantial considerations, has always been recognized by this court in dealing with many subjects, including taxation for special purposes. *Sanborn v. Commrs. Rice Co.*, supra; *Nichols v. Walter*, 37 Minn. 264, 272; *State v. Ritt*, 76 Minn. 531; *State v. Johnson*, 77 Minn. 453. See *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150; *Giozza v. Tiernan*, 148 U. S. 657; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339; *Magoun v. Illinois T. & S. Bank*, supra; *State v. Switzler*, supra; *State v. Donaldson*, 41 Minn. 74.

START, C. J.

This is an appeal by the plaintiff from the order of the district court of the county of McLeod denying his petition for a peremptory writ of mandamus requiring the probate court of that county

to proceed with the distribution of the estate of George Drew, deceased, without requiring the payment of an inheritance tax, as provided by Laws 1897, c. 293. The sole question for our decision is the constitutionality of such inheritance tax law.

We are relieved from any necessity of discussing the power of the legislature to enact a law taxing all inheritances, or the propriety of exercising such power, for it is unanimously conceded (as it must be) by counsel that such a law, if uniform and equal, without discrimination, would be constitutional, wise, and wholesome. Legacy and inheritance taxes are not of modern origin. They were imposed by the Roman civil law, and in England as early as 1780. They are now in force generally in the countries of Europe. Pennsylvania imposed such taxes by a statute enacted as early as 1826, and similar statutes are now in force in many of the other states of the Union. They have, as a rule, been held to be constitutional by state and federal courts. *Dos Passos, Inher. Tax*, c. 1. But Minnesota is, so far as we are advised, the only state whose constitution in express terms limits the power of the legislature in the laying of an inheritance tax. Therefore the precise question in this case is whether the act in question conforms to the limitations of our state constitution. Such being the case, it necessarily follows that the large number of judicial decisions in other jurisdictions, cited by counsel in this case, although interesting and helpful as illustrating the history of inheritance tax statutes and the general principles upon which they have been sustained, are not directly in point.

The here material provisions of our constitution are these:

"All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state: provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements \* \* \*: and provided, further, that there may be by law levied and collected a tax upon all inheritances, devises, bequests, legacies and gifts of every kind and description above a fixed and specified sum, of any and all natural persons and corporations. Such tax above such exempted sum may be uniform, or it may be graded or progressive, but shall not exceed a maximum tax of five per cent." Const. art. 9, § 1.



This proviso as to an inheritance tax was added in 1894 as an amendment to section 1, article 9, and is to be construed as a part thereof, precisely as if the original section and the proviso had been adopted at the same time, as a complete statement of the fundamental law upon the subject of taxes, including those upon inheritances. In order to determine intelligently whether the inheritance tax act of 1897 violates any of the provisions of this section, it is first necessary to ascertain its meaning.

The power of taxation by the state, except as limited by constitutional provisions, is practically unlimited, hence this section must be construed, not as a grant of the power of taxation, but as a limitation upon the exercise of the power. *Cooley*, Const. Lim. 105, 593. So construing it, its meaning is obvious, and it stands as a barrier against legislative invasion of the reserved rights of the individual as to the manner of imposing taxes upon him for the support of the state. Its keynote is that "all taxes to be raised in this state shall be as nearly equal as may be." Counsel for respondent, however, claim that this limitation, as originally adopted, applies only to taxes on property. If this be so, then the power of the legislature to lay unequal and arbitrary impost and excise taxes was left unrestricted. Such a construction is contrary to the spirit of the constitution, its clear and direct language, and the trend of all of the decisions of this court on the question. *Stinson v. Smith*, 8 Minn. 326 (366); *Sanborn v. Commrs. Rice Co.*, 9 Minn. 258 (273); *City of Faribault v. Misener*, 20 Minn. 347 (396); *Noonan v. City of Stillwater*, 33 Minn. 198, 22 N. W. 444; *State v. Gorman*, 40 Minn. 232, 41 N. W. 948.

It is true that all of these cases involved only questions as to taxes or assessments on property, but the rationale of the opinion in each case leads directly to the conclusion that all taxes, whether on property or in the form of excise and impost taxes, must, under this constitutional mandate, be laid as nearly equal as practicable. The case of *State v. Gorman* has been understood and cited as an authority that the requirement of our constitution that all taxes to be raised in this state shall be as nearly equal as may be applies to excise and impost taxes, and therefore a statute laying an inheritance tax would be unconstitutional. See *Magoun v. Illinois*

**T. & S. Bank, 170 U. S. 283, 18 Sup. Ct. 594.** In the Gorman case it was held that Laws 1885, c. 103, requiring, as a condition precedent to probate proceedings for the settlement of estates in probate court, the payment to the county treasury of specified sums arbitrarily prescribed with reference to the value of the estate, was unconstitutional, because it violated the constitutional requirement of equality of taxation. It is not quite clear whether this decision was based upon the proposition that the tax was one laid upon property or upon the privilege of having estates settled and distributed in the probate court. If the former,—which was probably the case,—the decision is not an authority for or against the right of the legislature to levy an inheritance tax under section 1, article 9, of the constitution. If the word “taxes,” as used in this section as it originally stood, includes excise and impost taxes, it by no means follows that a statute laying an inheritance tax, which aimed at practical equality, would not be valid.

Again, the decisions of this court with reference to statutes and ordinances imposing license fees upon auctioneers, draymen, hackmen, peddlers, persons dealing in intoxicating liquors, and others engaged in occupations of a character bringing them within the police power of the state, are based upon the proposition that the constitutional mandate that all taxes to be raised must be as nearly equal as may be includes excise and impost taxes. Such statutes have been sustained only upon the ground that the enactment was a proper exercise of the police power, and in every case where it was apparent that the license law was enacted with a view to revenue, and not as a police regulation, it has been held void, when the constitutional requirement of equality of taxation was disregarded. *City of Rochester v. Upman*, 19 Minn. 78 (108); *State v. Cassidy*, 22 Minn. 312; *City of Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *City of Duluth v. Marsh*, 71 Minn. 248, 73 N. W. 962; *State v. Finch*, 78 Minn. 118, 80 N. W. 856.

If, however, there is any doubt as to the proposition that under the original provisions of section 1, article 9, of the constitution, any statute laying an inheritance tax which ignored the fundamental principle of equality of taxation would have been invalid,

the doubt is set at rest by the proviso to the section adopted as an amendment thereto in 1894. The necessary effect of this proviso was to subject the power of the legislature to lay an inheritance tax to the original limitation that all taxes to be raised in this state must be as nearly equal as may be, for, as already suggested, the section in question, as it now reads, must be construed precisely as if the proviso had been a part of the original section; hence the mandate of equality qualifies the provisions of the amendment, and applies to the whole section. *Noonan v. City of Stillwater*, 33 Minn. 198, 22 N. W. 444. We therefore hold that by virtue of section 1, article 9, of our state constitution, as it now stands, the requirement of equality in taxation applies to inheritance taxes exactly as it does to taxes on property, except as expressly provided in the last proviso thereto. In reaching this conclusion we have not overlooked the fact that it is contrary to the great weight of authority in other states. But our constitution in this particular is unique, and its mandate is so clearly expressed as to leave no doubt as to its meaning; hence the decisions of the courts of other states are not in point.

Now, it is apparent from the mere reading of the proviso as to an inheritance tax in connection with the requirement of equality of taxation that any statute providing for an inheritance tax must lay the tax upon "all inheritances, devises, bequests, legacies and gifts of every kind and description," including those of real property as well as personal. There can be no discrimination in this respect. Therefore any statute laying a tax upon all bequests and gifts of personal property and exempting inheritances, devises, and gifts of real property would be void, for the reason that it would violate the constitutional mandate of equality of taxation, and the limitations of the proviso, which declares, in legal effect, that, if the legislature decides to lay an inheritance tax, it must be upon all bequests, devises, and gifts, without exempting any. It is equally clear, and for the same reason, that such a statute must lay the tax upon all bequests, devises, and gifts to "any and all natural persons and corporations." If any person or corporation is exempted from the burden, the statute is void. It might be

otherwise if the tax were one on property, and not on the privilege of receiving the property.

Again, the amendment provides that the tax may be laid upon all devises, bequests, and gifts "above a fixed and specified sum," and that "such tax above such exempted sum may be uniform or it may be graded or progressive, but shall not exceed a maximum tax of five per cent." These particular provisions are exceptions to the rule of equality in taxation, enforced by the general terms of the section. They authorize the exemption of devises, bequests, and gifts, to the extent of a fixed and uniform sum, from the operation of the tax, and the laying of the tax only upon the excess of such devises, bequests, and gifts. The exemption, however, must be uniform, and apply equally to all persons and corporations, for it is only the tax above a fixed and specified sum which may be uniform, graded, or progressive, in the discretion of the legislature. This last proviso is a distinct departure from the rule of equality, as near as may be, in the laying of taxes, for it expressly provides that the tax may be graded or progressive. This authorizes the legislature, in its discretion, to graduate the tax by increasing the percentage of the tax, within the maximum limit of five per cent., as the value of the property to be received increases, or as the relationship to the deceased of those who are to receive the property is more remote.

We come now to the question whether the inheritance tax law of 1897 violates any of the provisions of section 1, article 9, of the constitution, as we have construed it. The title of the statute is "An act for a tax on gifts, inheritances, devises, bequests, and legacies in certain cases," and its here material provisions are these:

"Section 1. A tax shall be and is hereby imposed upon the transfer of any personal property, of the value of five thousand (5,000) dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, not exempt by law from taxation on real or personal property, in the following cases:  
\* \* \* Such tax shall be at the rate of five (5) per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

"Sec. 2. When the property or any beneficial interest therein

passes by any such transfer to or for the use of father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or any children adopted as such, in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any person to whom any such decedent, grantor, donor or vendor for not less than ten (10) years prior to such transfer, stood in the mutually acknowledged relation of a parent, or to any lineal descendant of such decedent, grantor, donor or vendor, born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand (10,000) dollars or more, in which case it shall be taxable under this act at the rate of one (1) per centum upon the clear market value of such property."

It may be conceded, as claimed by counsel for respondent, that the tax attempted to be levied by this statute is not upon the property received by the beneficiary, but upon the privilege of receiving it. The statute, however, was enacted, by virtue of the legislative power of taxation, solely with a view to revenue, and the burden it seeks to impose is a tax within the meaning of the constitution. The first objection to the statute to be considered is the claim that, in so far as it attempts to tax lineal heirs (we use the term to designate the class referred to in the statute) and distributees at the rate of one per cent. of the value of the property and collateral heirs (that is, those not expressly named in the statute) at a higher rate (five per cent.) it is unequal taxation, and therefore unconstitutional. There is a natural reason for taxing the privilege of the latter of receiving the property at a higher rate than that of the former, and, as we have already decided, the proviso in question authorizes such graduation of the tax. Hence the statute is not unconstitutional for this reason.

It is further claimed that the statute is void because it allows a larger exemption to lineals (\$10,000) than to collaterals (\$5,000). It is unconstitutional for this reason, for, as already stated, the constitution authorizes only one uniform exemption to all persons and corporations. Again, it is urged that the statute is invalid because it lays the tax upon the entire devise, bequest, or distributive share, if of the specified value, and not upon the excess above a fixed specified exempted sum, as the amendment requires. The gross inequality of the statute in this respect is manifest. Thus,

by its terms, a tax on a legacy to a collateral heir of \$5,000 would net the beneficiary, after deducting the tax thereon (\$250), only \$4,750, while a legacy of \$4,999 would be exempt from the tax, and would give the beneficiary \$249 more than would the larger legacy. The constitution authorizes the laying of the tax only upon the excess above the exempted sum, and the statute violates the constitution in this respect. It is also contended on behalf of the appellant that the statute is unconstitutional because it exempts from the tax all persons and corporations whose property is exempt by law from taxation. It is invalid for this reason, for the constitution expressly provides for a tax "upon all inheritances, \* \* \* of every kind and description," to "all natural persons and corporations." The statute is unconstitutional for the further reason that it exempts from its operation all devises, bequests, and transfers by intestate laws of real property, and lays the tax only upon those of personal property. This is forbidden by the constitution.

In holding this statute unconstitutional for the reasons stated, we have not overlooked the fact that it is substantially a copy of the inheritance tax law of the state of New York (except that the latter applies to both real and personal property), which has been sustained by the courts of last resort of that state and by the supreme court of the United States. But this is immaterial, for the constitution of the state of New York contains no limitations and restrictions upon the exercise of the power of taxation by the legislature similar to those of our own constitution which we have considered. This difference in the constitutions of the two states seems to have been lost sight of in the adoption of the New York statute in this state, and explains why a statute which violates our constitution in so many particulars was enacted.

It follows that the order appealed from must be reversed, and the cause remanded, with directions to the district court to grant the writ of mandamus prayed for. So ordered.

**ELZEARD GODBOUT v. ST. PAUL UNION DEPOT COMPANY.**

February 16, 1900.

Nos. 11,885—(205).

**Control of Railway Station by Owner.**

In an action for damages brought by a hackman against the Union Depot Company for being prohibited from soliciting business within the building, *held*, that a common carrier has, by virtue of its right of ownership in its property, the control of its depots, subject only to the rights of the public having business relations with it.

**Regulations—Special Privileges.**

Such common carrier may make such rules and regulations as it deems necessary for the control of its business within such building, and may grant special and exclusive privileges to hackmen to solicit business, provided such rules and regulations are reasonable, and conduce to the comfort, convenience, and interest of its patrons.

**G. S. 1894, § 380, subd. b.**

G. S. 1894, § 380, subd. b, applies only to those persons or parties having contractual relations with a common carrier.

**Hackmen Soliciting Business.**

A hackman or private carrier for hire is not a party having such relations with a common carrier as will permit him to enter a depot to solicit business from passengers.

**Same—Outside of Station.**

Such hackmen and private carriers, in common with all others in that business, have the right and privilege of soliciting public patronage, without being discriminated against, at all points without the depot, when such points or places have been properly designated.

**Same—Right of Entry.**

All hackmen and persons engaged in the business of conveying passengers and baggage for hire have the right of entry, without discrimination, to the depots of a common carrier, to deliver or receive passengers or baggage, in pursuance of a contract or order, subject to proper rules and regulations, for the interest of the traveling public.

**Exclusive Contract—Evidence.**

The contract and evidence in the case examined, and found to provide

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a reasonable and proper arrangement for the patrons of the defendant, in reference to the transfer of passengers and baggage.

Action in the district court for Ramsey county to recover \$500 damages by reason of defendant's ejection of plaintiff from its depot building. The case was tried before Brill, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*Stevens, O'Brien, Cole & Albrecht*, for appellant.

Defendant is a quasi public corporation, holding under its charter rights and privileges granted to it upon that theory; this involves duties and responsibilities upon its part towards the public which it is obliged to discharge faithfully in obedience to the trust imposed on it. *State v. St. Paul U. D. Co.*, 42 Minn. 142; *St. Paul U. D. Co. v. Minnesota & N. W. R. Co.*, 47 Minn. 154; *Indianapolis v. Cooper*, 6 Ind. App. 202; *Fetter*, Car. § 204. Plaintiff is a common carrier, no less than defendant, with all the rights and obligations inherent in that capacity. *Hutchinson*, Car. §§ 59-61; *Fetter*, Car. § 207. Defendant is a common carrier, subject to all the duties and obligations of a railroad company. *Pennsylvania v. Ellett*, 132 Ill. 654; *Indianapolis v. Cooper*, supra; *Fetter*, Car. § 204; *Inhabitants v. Western*, 4 Metc. (Mass.) 564.

Certain propositions of law may be admitted: 1. A common carrier has the right to establish and enforce reasonable rules and regulations governing the use of its station grounds, to facilitate the transaction of its business, to preserve order, and to protect those lawfully upon its premises. *Dowd v. Chicago* (Wis.) 20 L. R. A. 527, notes. 2. When reasonably necessary, a common carrier may entirely exclude all hackmen, without discrimination, from soliciting patronage on its conveyances and station grounds by suitable and uniform regulations. *Lindsey v. Anniston*, 104 Ala. 257; *Landrigan v. State*, 31 Ark. 50; *Com. v. Power*, 7 Metc. (Mass.) 596; *Summitt v. State*, 8 Lea, 413. 3. The carrier may prescribe and enforce reasonable regulations assigning particular positions to each hackman, such regulations applying to all indiscriminately. *Cole v. Rowen*, 88 Mich. 219; *Lucas v. Herbert*, 148 Ind. 64. 4. A carrier may by rule prohibit hackmen from



obstructing the entrance to its station, although equitable relief will be afforded only in case of special damages. *Smith v. New York*, 149 Pa. St. 249; *Pittsburgh v. Cheevers*, 149 Ill. 430. 5. No one has the right to ply a strictly private business, not affected by a public interest, on conveyances or premises of the carrier, such as vending news, edibles, stationery, or flowers. *Fluker v. Georgia*, 81 Ga. 461; *Cosgrove v. City Council*, 103 Ga. 835. 6. A carrier may lawfully exclude from its cars or vessels while in transit, all transfer agents, not specially privileged to solicit patronage, even though such agents may be passengers, such conveyances in transit not being intended as places for the transaction of the passengers' business. *Jencks v. Coleman*, 2 Sumn. 221; *Barney v. Oyster Bay*, 67 N. Y. 301; *Barney v. The D. R. Martin*, 11 Blatchf. 234. 7. A hackman or transfer agent cannot lawfully be excluded from station grounds when he enters pursuant to a special engagement with a passenger. *Griswold v. Webb*, 16 R. I. 649.

It is a disputed question whether or not a carrier can grant exclusive privileges upon its conveyances to a single express company. *Express Cases*, 117 U. S. 1, accord; *Sandford v. Railroad Co.*, 24 Pa. St. 378; *New England v. Maine*, 57 Me. 188, contra. The discrimination sought to be established violates both the express statutes and the legislative and judicial policy of this state. *G. S. 1894*, § 380, subd. b. Our statute differs materially from the act of Victoria construed in the English cases; and the circumscribed construction attempted to be placed upon it is not warranted. *Myers v. Chicago, M. & St. P. Ry. Co.*, 50 Minn. 371; *Farwell Farmers' Warehouse Assn. v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 55 Minn. 8. What the legislature could not do directly cannot lawfully be done by the by-laws or regulations of a corporation which it has created. *Dunham v. Village of Rochester*, 5 Cow. 462.

The American authorities conflict somewhat on the question whether or not the carrier may lawfully grant exclusive privileges to a single hackman to solicit patronage upon its station grounds. The authorities sanctioning such discrimination are: *Old Colony v. Tripp*, 147 Mass. 35, followed in *Com. v. Carey*, 147 Mass. 40, note; *New York v. Flynn*, 74 Hun, 124; *New York v. Sheeley*, 27 N.

Y. S. 185; *Barry v. Rainey*, 57 Id. 766; *Brown v. New York*, 75 Hun, 355; *Alexandria v. New York*, 18 App. Div. 527; *New York v. Scoville*, 71 Conn. 136. Authorities denying the right to discriminate are: *Indianapolis v. Dohn*, 153 Ind. 10; *Markham v. Brown*, 8 N. H. 523; *McConnell v. Pedigo*, 92 Ky. 465; *Montana v. Langlois*, 9 Mont. 419; *Kalamazoo v. Sootsma*, 84 Mich. 194; *Cravens v. Rodgers*, 101 Mo. 247; *State v. Reed*, 76 Miss. 211; *Indian v. East Coast*, 28 Fla. 387; *Camblos v. Philadelphia*, 9 Phila. 411. The weight of authority is against discrimination. 1 *Fetter*, Car. § 245; *Indianapolis v. Dohn*, supra.

Plaintiff had both a statutory and common-law right of entry upon defendant's station grounds in common with any or all others in the transfer business to whom such privilege is conceded, subject to reasonable and uniform regulation. Even if such right of entry does not exist as matter of law, no discrimination can be exercised against plaintiff. In support of a hackman's common-law right of entry, subject to regulation, upon the station grounds of a carrier, it is to be observed that plaintiff, as a hackman, is a common carrier with all the rights and obligations of such. *Hutchinson*, Car. §§ 59-61; 1 *Fetter*, Car. § 207. Defendant is exercising a public franchise conferred by the state, under which its property is dedicated to a public use, imposing the obligation to maintain its union depot as a legal duty. The use of the depot is not restricted to those merely who are seeking to avail themselves of the services of the carrier or who sustain contractual relations with him; but such right of public use extends, subject to reasonable regulation, to all whose specific errand or general occupation is of a quasi public character and is necessarily conducted in connection with the railroad business. Such right of entry, for instance, is possessed by those who have merely business or social engagements with passengers or come merely to meet or part with guests. *Hutchinson*, Car. (1st Ed.) §§ 522, 523; *Dowd v. Chicago*, supra; *Ingals v. Adams Exp. Co.*, 44 Minn. 128; *Munn v. Illinois*, 94 U. S. 113.

The right of reasonable regulation may extend perhaps even to the entire exclusion of hackmen, as a class, if necessary to the proper discharge of the carriers' public duties. *Lindsey v. Annis-*

ton, *supra*; *Landrigan v. State*, *supra*. But all rules and regulations must apply impartially to all of the same class. The granting of an exclusive privilege is not a reasonable rule or regulation. *Indianapolis v. Dohn*, *supra*. A hackman is entitled to invoke passengers' rights in his own behalf. The weight of American authority is against the right to grant exclusive privileges. See cases cited *supra*.

*Hadley & Armstrong*, for respondent.

LEWIS, J.

Defendant is a corporation, under the laws of Minnesota, owning and operating transfer tracks in the city of St. Paul, and, in connection therewith, owning and maintaining a union passenger depot, and tracks for access thereto, which are used by defendant for the carriage of passengers into and out of the city, amounting to many thousands daily. On February 1, 1899, defendant entered into an agreement with J. B. Cook & Son, as follows:

"This agreement, made and entered into this first day of February, A. D. 1899, by and between the St. Paul Union Depot Company, party of the first part, and J. B. Cook & Son, party of the second part, witnesseth:

Whereas, said party of the first part deems it necessary, for the convenience of the public using its depot, that an opportunity be had in its depot building to engage for transfer of baggage and for engaging passage to various parts of the city in omnibuses and carriages; and whereas, it would greatly interfere with the prompt dispatch of business, as well as with the comfort and convenience of passengers using said depot, to be importuned by hackmen and transfer men generally while passing through or waiting in said station, and it is for the best interest of the people using said station that the privilege of soliciting such business should be confined to some one person or firm, over which said party of the first part can exercise control in the way said business shall be conducted:

Now, therefore, said party of the first part, in consideration of the covenants and agreements to be kept and performed by the party of the second part, does hereby grant to said party of the second part, during the continuance of this agreement, the exclusive privilege of soliciting and contracting with passengers for the transfer and delivery of baggage, for passage in omnibuses to various parts of the city, and for hiring of hacks, cabs, and carriages, within the Union Depot building, and train sheds attached,

at the city of St. Paul, and also permission to occupy and use the stand in the said depot building set apart for that purpose.

In consideration thereof, said parties of the second part covenant and agree as follows: (1) During the continuance of this agreement to, at all times during the day, and on the arrival of trains during the evening, keep an agent at said stand to attend to and accommodate the public in connection with such business. Such agents shall, while attending to such business, wear a cap similar to those usually worn by railroad employees, lettered in such a manner as to indicate his business to the public. (2) To have an agent meet all important trains arriving at said depot before they reach the city of St. Paul, and give the passengers on such trains an opportunity to arrange for passage in said omnibuses, for the hire of carriages, and the transfer or delivery of baggage, before arriving at said depot. (3) All employees of the parties of the second part shall transact their business in and about said station in a quiet and polite manner, and they shall in this regard be subject to the direction of the superintendent of the party of the first part, and said parties of the second part agree to dismiss from their service in or about said depot any agent, driver, or other employee, after receiving written notice of his objection to the employment of such man by the superintendent of the party of the first part. (4) To have present at said station, upon the arrival of all important trains, one or more omnibuses to take passengers to the various hotels in the central part of the city, and also to have within call at said station, on the arrival of all trains, a sufficient number of hacks, carriages, or cabs to accommodate the passengers using said depot on all ordinary occasions, and that such hacks, carriages, cabs, and omnibuses shall be kept in a clean, neat and serviceable condition, and provided with strong, gentle, and serviceable horses, and to employ drivers who are of temperate habits, polite, honest, and reliable, and capable of performing their duties in an efficient manner. (5) The scale of charges demanded for services shall in all cases be reasonable, and not greater than those provided for by the ordinances of the city of St. Paul, and proof of any extortionate charging or unfair dealing by any driver or employee to or with any of the patrons of said depot shall be deemed sufficient grounds for the party of the first part to demand the dismissal of such driver or employee from the service of the parties of the second part. (6) Said parties of the second part will hold and save the party of the first part harmless from any and all damages, costs, and expenses on account of any acts or omissions of any of the employees of said parties of the second part. (7) That the parties of the second part will protect and save and hold harmless the party of the first part from any and all expenses, costs, and damages on account of any action at law or suit of any kind that may be brought against it, by any

person or persons, on account of granting the exclusive privilege hereinbefore mentioned to the parties of the second part. It is covenanted and agreed that this contract may be terminated by either party by giving to the other 30 days' written notice of its intention so to do.

In witness whereof, said party of the first part has caused these presents to be signed by its president, and the parties of the second part have hereunto set their hands, the day and year first above written.

Saint Paul Union Depot Company,  
By W. A. Scott, President.  
Jno. B. Cook & Son."

Cook & Son had, long prior to the time of operating under the agreement, owned and operated omnibuses and hacks, in the city of St. Paul, for the carriage of passengers for hire, and had agreements with the various railroad companies running trains into said city, authorizing them, and their agents, to enter such trains, and take up transfer coupons issued by the companies to passengers. For the purpose of attending to this business, Cook & Son placed their agents upon such trains, and maintained a stand in the Union Depot, with men in attendance to take up the checks and coupons issued to passengers on the trains. After the agreement was entered into, Cook & Son continued to enter the arriving trains for the same purpose, and continued to maintain such stand in the Union Depot, and kept therein from two to four agents to attend to the business of transfers, and to solicit transfer business to other depots and hotels from the passengers generally arriving and passing through. While Cook & Son were conducting such business pursuant to the agreement, defendant prohibited the plaintiff, and all other hackmen and persons engaged in carrying passengers and baggage in vehicles for hire, from soliciting patronage within the depot, and from exercising therein the privileges granted Cook & Son under their contract. During the time mentioned, there were a large number of persons operating vehicles for the carriage of persons and baggage for hire to and from the Union Depot. The entrance to, and exit from, the depot is about 24 feet from the street line of Sibley street, a public street of St. Paul, and along this street, opposite the depot entrance, in a space allotted by the city authorities, all vehicles landed and received their passengers.

On February 9, 1899, plaintiff was the owner of a hack, and used the same in said city to convey passengers for hire to and from different places in said city, and to and from said depot and other points in said city. On that day plaintiff placed his hack in the allotted space, and leaving the same in the charge of a driver, and with knowledge of the regulations and arrangements between defendant and Cook & Son, entered the Union Depot, and, without disturbance, did solicit persons arriving on trains in said depot to become passengers in his hack. Defendant thereupon requested plaintiff to cease such soliciting, and, upon refusal to cease, ejected him from the building. Plaintiff brought this action to recover damages. The cause was tried by the court without a jury. The court found substantially the facts as above stated, and ordered judgment for defendant. From an order denying a new trial, plaintiff appealed.

The view we take of the case makes it unnecessary to consider whether Ordinance No. 376 was valid and binding upon plaintiff. We assume that he was a duly-licensed hackman.

Appellant bases his right to recover upon the following propositions: (1) That the defendant is a quasi public corporation, holding, under its charter, rights and privileges which involve duties and responsibilities upon its part towards the public; (2) that the plaintiff, as a hackman, is a common carrier, with all the rights and obligations as such; (3) that plaintiff has both a statutory and common-law right of entry to defendant's depot, in common with any or all others in the transfer business to whom such privilege is conceded, subject to reasonable and uniform regulations; (4) that, even if such right of entry does not exist as a matter of law, no discrimination can be exercised against plaintiff.

To put it differently, plaintiff, as a common carrier, has both the statutory and common-law right of entry to the Union Depot, in common with other common carriers accorded the privilege; but, if no common carrier has the legal right of entry, defendant cannot discriminate, by admitting one to special privileges and excluding others.

Of the several cases relied on by appellant, the following are the leading ones, and are the most favorable to his contention: Mon-

tana v. Langlois, 9 Mont. 419, 24 Pac. 209, held that a railroad company could not grant to one person the exclusive right to use a portion of its depot platform to deliver and receive passengers and to solicit patronage; such grant being against public policy, and contrary to a constitutional provision that

"No discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company, between persons or places within this state."

The decision is based squarely upon the mutual relations of the common carrier and its passengers; that all passengers, in common, are entitled to equal opportunities and conveniences of place to approach and depart from the trains; that the contract of carriage between the carrier and its passengers commences or terminates at the station, and passengers must have the right of competition among hackmen, and freedom of choice in selecting their method of transfer beyond the station. This case is followed in *Kalamazoo v. Sootsma*, 84 Mich. 194, 47 N. W. 667, where a like contract was under consideration. While the opinion is expressed that such exclusive contracts, as to depot approaches, tend to establish monopolies, not granted by the charter of the carrier, nevertheless the same principle is invoked as was applied in *Montana v. Langlois*, supra. *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106, is a similar case, and the decision is placed upon the same grounds,—that free competition tends to establish a reasonable price, and affords the safest, best, and most comfortable means of conveyance, a rapid passage, and polite and agreeable service to the traveling public. In *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15, although no statute was in effect, the court held, upon grounds of public policy, that an exclusive contract with one hackman for platform privileges was in contravention of the rights and privileges of passengers. To the same effect, see *Indianapolis v. Dohn*, 153 Ind. 10, 53 N. E. 937.

There is another line of cases which adopt a different rule, and which are relied on by respondent. The leading case is *Old Colony v. Tripp*, 147 Mass. 35, 17 N. E. 89. The railroad company entered into an exclusive contract with one to furnish the means to carry

passengers and their baggage from its station. All others were prohibited from entering the company grounds to solicit business, although they might enter to deliver or receive passengers upon order. The following statute was construed:

"Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." Pub. St. 1882 (Mass.) c. 112, § 188.

The majority of the court held that the use of its depots and grounds obviously meant a use of right; that the statute did not intend to prescribe who shall have the use of the grounds, but to provide that all who have the right to use them shall be furnished by the company with equal conveniences; that the statute applied only to relations between railroads as common carriers and their patrons; that the defendant, in his business as solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to its station grounds and buildings. Three judges dissented, and placed their opinion upon the ground that the rule established by the majority would enable a railroad company largely to control the transportation of passengers and merchandise beyond its own lines, and to establish a monopoly not granted by its charter, which might be for its own benefit, and not for the benefit of the public; that such a regulation did not give to all persons or companies reasonable and equal terms and facilities, as required by the statute. This dissenting opinion is referred to and approved in *Montana v. Langlois*, *supra*. The doctrine laid down in *Old Colony v. Tripp* is followed in *Brown v. New York*, 75 Hun, 355, 27 N. Y. Sup. 73; also in *Griswold v. Webb*, 16 R. I. 649, 19 Atl. 143, the reasoning is adopted, but distinguished, and it is held that the carrier could not deprive a passenger of the privilege of being carried from the terminus by other means than as provided by it. In *New York v. Flynn*, 74 Hun, 124, 26 N. Y. Sup. 859, the Massachusetts rule is followed, the facts being similar.



In an English case (*Beadell v. Eastern*, 2 C. B. [N. S.] 509) the company had sold for £600 the exclusive right to ply for hire within their station. The court held that no inconvenience to the public had been shown, and that it was important to the interests of the public that the vehicles which ply for hire in the station yard should be kept upon their good behavior, by being under the control of the company. To the same effect, see *Barker v. Midland*, 18 C. B. 46. These English cases were discussed and treated as authority in several of the American cases *supra*.

It is well settled that a common carrier may grant the exclusive privilege of soliciting the patronage of passengers on its boats and trains; also to sell books and refreshments on its trains, grounds, and depots. *Fluker v. Georgia*, 81 Ga. 461, 8 S. E. 529; *Barney v. Oyster Bay*, 67 N. Y. 301; *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *Barney v. The D. R. Martin*, 11 Blatchf. 234, Fed. Cas. No. 1,030. We have met with no case to the contrary. Conceding to appellant the most favorable interpretation of the cases bearing upon this subject, we find that the courts have gone no further than to prevent discrimination in granting privileges at the point where the contractual relations between the company and the passengers cease; that is, at the station yard or platform where passengers enter and leave the premises. No case has been brought to our attention where an attempt has been made to apply the rule within a depot, where the general business is transacted between a common carrier and its patrons.

No complaint is made in the case before us that any discrimination was practiced against appellant outside the depot. He seeks, however, to extend the doctrine of no discrimination in soliciting patronage to the very heart of the building, where thousands of people are passing through daily, pursuant to their business relations as passengers with defendant. Whether arising upon considerations of public policy, or having its foundation in a statute, the principle which applies to prevent discrimination is that the rights of the public must be subserved. The passenger is entitled to have the benefit of open competition among carriage men at the place of departure from the depot. Any interference beyond this point by the company would be unwarranted, and an exercise of

power not granted by its charter. This is the principle recognized and adopted in most of the cases relied upon by appellant, and, so far as those cases are based upon that principle, we consider them authority. But within the Union Depot the condition is different. Here are located offices and rooms for the accommodation and convenience of the masses of persons departing, arriving, and waiting for trains. It is a public building only in a qualified sense. Its use is confined to the care and accommodation of those having business with the roads. The defendant was compelled to construct it to properly care for the business it had to do under its charter. The traveling public have rights and demands in their relations with the defendant which the building was designed to meet. The company cannot discriminate between different persons dealing with it as a common carrier. For the benefit of all such patrons, it may make necessary rules and regulations. The same rule that permits common carriers to control the sale of articles upon their trains by restricting the number; the same rule that permits it to grant special privileges to expressmen and transfer agents upon its trains,—applies to a depot where practically the same relations exist between the company and its patrons.

The statute cited by appellant (G. S. 1894, § 380, subd. b), is a part of the warehouse and commission laws, and has reference only to parties having contractual relations with common carriers. Appellant is not a common carrier. He has no established route, place of business, or time of employment. He is a carrier in a restricted sense, but had no contractual relations with defendant on the day he was evicted from the building. But, even if the statute were general and applicable, the conclusion would be the same.

Neither does it make any difference whether appellant is a common or a private carrier; the rule applies to the same extent. As a private carrier, he may, without being discriminated against, solicit business outside the building. As a private carrier, he has the right of entry to deliver or receive passengers; for then he would have contractual relations with the company through the passenger. The contract with Cook & Son recites that defendant deemed it necessary, and for the convenience of the public, to have

an opportunity to secure transfer privileges within the depot. Cook & Son are under obligations to have an agent meet the trains, and arrange for transfers of passengers on the trains and in the depot, to preserve order, and to have on hand proper vehicles, and to make reasonable charges. If this arrangement is a reasonable and proper one for such passengers and patrons, and conserves their interests, and does not tend to deprive them of proper opportunity to control their action after leaving the depot, then there is no ground for complaint. There is no evidence in the case tending to show that the arrangement provided by the contract is unreasonable, or that it in any respect interferes with the rights of the traveling public. On the other hand, the court below found, as a fact, that the contract conduced to the convenience and comfort of the public, and to the orderly performance of its business by defendant. If appellant were admitted to the building to solicit business, then all hackmen would have to be admitted. The presence of soliciting agents, without restrictions, would interfere with the comfort, welfare, and convenience of the public. It would not change the principle involved if, as appellant contends, all the hackmen in the city could be admitted in rotation daily or weekly, and thereby order and public convenience be conserved.

We therefore conclude as follows: That neither a hackman nor a common carrier has either a statutory or common-law right to enter the Union Depot to solicit business; that both may enter the depot for the purpose of delivering or receiving passengers upon order or contract; that all carriers, private and public, have a common right, without discrimination, to solicit patronage at such points as may be properly designated beyond the depot; that within such building defendant is compelled to make such proper rules and regulations as will conserve the interest and convenience of the traveling public; that within such building defendant has control of its property and business, by virtue of its right of ownership, subject only to the rights of the public transacting business with it; and, as an incident to such obligations to the public and right of ownership, defendant may grant special privileges for the transfer of passengers and baggage.

Order affirmed.

STATE ex rel. BOARD OF EDUCATION OF MINNEAPOLIS v. CLEMENT  
J. MINOR.

February 19, 1900.

Nos. 11,976—(223).

**Laws 1899, c. 77, Constitutional.**

*Held:* Laws 1899, c. 77, providing for an extra levy of one and one-half mills on the dollar in school districts having 50,000 inhabitants, is constitutional, and not special legislation within the provisions of sections 33 and 34, article 4, of the constitution.

**Same—Additional School Tax.**

As to the amount of tax authorized the act is not based upon special legislation and is therefore uniform in its application.

**Same—Collection not Dependent upon Special Legislation.**

The levy, certification, and collection of the tax do not depend upon the provisions of special legislation, the general statutory provisions being ample for that purpose.

**Same—Recognition of Special Laws.**

The act recognizes and adopts school districts as organized under special laws, but such recognition does not render the act repugnant to the prohibition against amending, extending, or modifying special laws.

Mandamus in the district court for Hennepin county to compel respondent, as county auditor of that county, to extend on the tax rolls for the year 1899 the tax and levy of nine-tenths of one mill on each dollar of the assessed valuation of the taxable property within the city of Minneapolis, amounting to \$96,056.25, levied by resolution of the board of education of said city. From a judgment, entered pursuant to the order of Elliott, J., adjudging that a peremptory writ issue, commanding the levy to be extended as prayed, respondent appealed. Affirmed.

*Louis A. Reed*, County Attorney, and *C. S. Jelley*, for appellant.

*Frank Healy*, for respondent.

*Hahn, Belden & Hawley* and *Walter L. Chapin* also filed briefs on behalf of respondent.

LEWIS, J.

Mandamus proceedings to compel the county auditor of Hennepin county to extend upon the tax rolls of said county for the year 1899 the tax and levy of nine-tenths of one mill on each dollar of the assessed valuation, which had been levied by a resolution of the board of education of Minneapolis under and pursuant to Laws 1899, c. 77. The court below granted the motion of relator and ordered a peremptory writ to issue commanding said levy to be extended. Thereupon judgment was entered and the auditor appealed.

The only question involved is the constitutionality of chapter 77, which is attacked upon the ground that it is special legislation. In the case of *State ex rel. v. Johnson*, 77 Minn. 453, 80 N. W. 620, a similar law was under consideration and by a divided court held to be unconstitutional. In view of the fact that that decision was not the expression of the united court, is of such recent date, and the matter involved being of unusual importance, the construction of the constitutional enactment which has been the source of much legislation and litigation, we have concluded that the decision referred to should not be regarded final upon the doctrine of stare decisis. With all due deference therefore to the learned justices who gave expression to their views in that case, we proceed to a re-examination of the questions there passed upon.

Section 1 of chapter 77 reads as follows:

"School districts now or hereafter having over fifty thousand inhabitants are hereby empowered to raise annually by taxation, independently of and in addition to other sums for school purposes authorized by law, an amount not exceeding one and one-half mills on each dollar of the assessed valuation of taxable property within such district for the purchase of school sites," and other school purposes.

"Sec. 2. This act shall be construed as an independent and separate grant of power and shall in no wise supersede existing provisions of law for raising revenue for the support of schools, whether under general or special laws, but the powers here given may also be exercised concurrently with other powers and to provide a greater revenue for the schools within such district, limitations of power under existing laws notwithstanding."

The constitutional provisions in reference to special legislation (Const. art. 4), are, so far as here important, as follows:

Sec. 33. "In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward, or school district, \* \* \* regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes \* \* \*. The legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same.

Sec. 34. "The legislature shall provide general laws for the transaction of any business that may be prohibited by section one (sec. 33) of this amendment, and all such laws shall be uniform in their operation throughout the state."

We deem the provisions of section 2 of said chapter 77 to constitute an attempt on the part of the legislature to declare the act to be a general law, and we therefore decline to give this section any consideration. The act must stand or fall independently of such declaration of intent.

As stated in *State ex rel. v. Johnson*, supra, the cities falling within the class are Minneapolis, St. Paul, and Duluth and, under the special laws in force prior to the passage of chapter 77, the maximum limit of taxation for school purposes in Minneapolis was four mills, in St. Paul two and one-half mills, and in Duluth, under the general laws, fifteen mills on the dollar. Appellant contends that chapter 77 is a special law because it cannot operate uniformly in its application to all the members of this class; that the rate in Minneapolis would be increased to five and one-half mills, in St. Paul to four mills, and in Duluth to sixteen and one-half mills; and in order to ascertain what the maximum rate is in Minneapolis or St. Paul under chapter 77, resort must be had to the special laws governing those cities, and that this is in effect an amendment to said special laws; that the result is a lack of uniformity, and hence fatal under section 34. Again it is contended that, even if the law is uniform in its application to the several

cities, yet it cannot be enforced without adopting the special legislation contained in the various charters relating to levying, certifying, and collecting the tax.

Upon the question of the uniformity of the law as affected by the additional levy of one and one-half mills reference is made to the dissenting opinion of the CHIEF JUSTICE and to the concurring opinion of Justice MITCHELL in *State ex rel. v. Johnson*, supra, for a discussion of this point, and we adopt the views there expressed on that question.

The majority of the court, when that case was under discussion, adopted the view that the act was repugnant to the constitutional provision which prohibits the legislature from amending, extending, or modifying existing special legislation; that the tax could not be levied and collected without adopting special legislation for the purpose. This view seems to have been based upon the case of *Alexander v. City of Duluth*, 57 Minn. 47, and the case of *Bowe v. City of St. Paul*, 70 Minn. 341. While we believe those cases were correctly decided, in our view of this matter they do not control the case before us.

In the *Alexander* case, Laws 1893, c. 210, was under consideration, and the act provided that in certain cities where tunnels were necessary to connect portions of the city divided by navigable waters, the common council (public interest requiring it) might cause to be constructed such tunnels, and assess the property benefited thereby for three-fourths of the cost, the balance to be a general charge against the city. It was also provided that the proceedings to enforce the assessment and to condemn the necessary property should conform to the proceedings in force in the cities undertaking such improvement. There was no attempt to formulate a general law in this respect. It was held that this was adopting the various special provisions of the cities of the class to enforce the act, and was special legislation, because it was a modification and extension of those special laws. However there are some expressions in the opinion, which are relied on by appellant and urged as applicable here, as follows: "Previous special legislation can never be made the basis of classification, and the legislature cannot touch it, except to repeal it."

In the *Bowe* case (70 Minn. 344) this language is quoted as applicable:

"It must appear that the act will always, by the force of its own terms, continue to be a general law. \* \* \* A general law cannot be based on special laws, even though its operation is general when passed, if the legislature, by the future repeal of any or all of the special laws, may render the so-called general law special in its operation and effect."

These are abstract propositions, and cannot be taken as an expression of the law applicable to the case under consideration.

The constitutional amendments were adopted for the purpose of avoiding prolific legislation in reference to the subjects mentioned. Special legislation had become a burden. By proper classification general laws could be made applicable. Judicial interpretation has developed this idea, and the tendency has been, and is, to arrange and divide the subjects under general laws. The different sections referred to must be considered together; each clause be given due weight with reference to the others. Upon such consideration it seems to us that undue weight has been given to the words, "but shall not amend, extend, or modify any of the same." If this part be taken independently of the balance, and strictly construed, then it would follow that the legislature could not touch a special law except to repeal it. But if the provisions of section 34 in reference to the passage of general laws to cover the prohibited subjects be given consideration, it follows that such general laws must deal with such special subjects, taking into account the conditions existing at the time the amendments were adopted. Cities and school districts had been organized, and were then existing under special laws.

Sp. Laws 1878, c. 157, as amended by Sp. Laws 1885, c. 86, establishes the board of education of Minneapolis and authorizes said board to levy annually a tax for school purposes not to exceed four mills on the dollar, and to make return of its annual levy to the county auditor, and all such taxes shall be collected and the payment thereof enforced with and in the same manner as state and county taxes. G. S. 1894, § 1557, provides that the taxes voted by cities, villages, townships, and school districts, shall be certified



by the proper authorities to the county auditor on or before October 10 in each year and, under the general provisions of the general statutes, the tax is collected and the money finally paid over to the county treasurer, and section 1576 provides that the county auditor shall keep account with each school district in the county, and after settlement with the county treasurer shall credit the collections to the proper fund. Section 1577 provides that the county treasurer shall pay over to each school district, on order of the county auditor, all money collected and belonging to the same. So the fact is, that there are existing general provisions of law as to the levy and certifying of the levy to the county auditor, the collection of the tax, and payment of the same to the board of education.

Chapter 77 recognizes the existence of the school district only to confer upon it authority to levy the extra one and one-half mills for school purposes. The provision in Sp. Laws 1878, c. 157, in reference to authority of the board of education to make the levy and certify the levy to the auditor, may be repealed or ignored, and the law remains complete and does not call into effect any express action authorized by the special act. Is this amending, extending, or modifying a special law within the intent of the constitutional amendments? If so, then G. S. 1894, § 1557, is a special law; so are the other general provisions referred to, for the cities and school districts organized under special charters are referred to and adopted in the application of those provisions. If the amendments are to be construed as contended for, then school districts and municipalities organized under special laws are beyond the aid of the legislature. If chapter 77 is unconstitutional, then a general enactment applicable to all school districts in the state would for the same reason be invalid.

There is authority beyond our own state to the effect that a reference to special charters and laws is not the test of special laws. One reference will be sufficient. In the case of *Van Ripen v. Mayor*, 58 N. J. L. 262, there was before the court an act which provided that the board of aldermen, public works, water commissioners or other board, body, or department of any municipality having the charge or control of water supply, could enter into

an agreement with reference thereto, provided that, in cities having a board of finance and taxation, such contract should be referred to and approved by it. This law was attacked as being special legislation. It was held constitutional. The reference to the various boards created by special charter did not make the act a special law. No dissimilarity is created. All boards are endowed with the same power.

We therefore hold, overruling State ex rel. v. Johnson, that the act in question is constitutional.

Judgment affirmed.

COLLINS, J. (dissenting).

I quite agree with the majority in their assertion that the decision in State ex rel. v. Johnson, 77 Minn. 453, 80 N. W. 620, should not be regarded as final on a question of this importance, and therefore do not place my dissent herein on the principle of stare decisis. I put it squarely on the ground that the act now before us, chapter 77, and the one considered in the Johnson case, chapter 40, indistinguishable in fact, and designed to cover the cities of Minneapolis and Duluth (each being incorporated as an independent district, with a distinct name and a governing body wholly disconnected from the municipal government), and the city of St. Paul (which is a district in itself with school inspectors appointed by the mayor and in all financial matters merely advisory to the common council), were actually intended to be and are nothing more than evasions of the constitutional provisions in respect to special legislation. I need not repeat what was said in the Johnson case in support of this position by the three members of the court, as it was then constituted, who agreed on this point. The views therein expressed will, I believe, commend themselves to those, in and out of the legal profession, who believe that the voice of the people as enunciated in article 4, § 33, as amended in 1892, should, if disobeyed by the legislature, be observed and respected by the courts.

The history of this amendment is not without its lesson. After a struggle in the legislature which lasted through three separate sessions, there was adopted, in 1881, the first amendment prohib-

itive of special legislation on certain specified subjects, and providing for the enactment of general laws for the transaction of prohibited business. Experience with the legislature soon demonstrated to the people that there was no hope for relief in the enactment of general laws which would bring about the desired uniformity in the various statutes under which public and private corporations were acting, and public, as well as private, business was being transacted, and, after much agitation, the very radical amendment of 1892 was submitted to the people and adopted by a majority, which clearly, and perhaps unfortunately, indicated that the people were hostile to legislation special in its nature, no matter what the form might be. Since that time attempts have been made, again and again, by appointed and self-constituted committees and commissioners from cities and school districts, large and small, in this state, to "get together" on general legislation, but without avail. If the legislation now under consideration be sustained there need be no further effort made in this direction, for all that is needed to amend every act incorporating a city or a school district is a basis for classification. We shall hear no more of efforts to place all cities and school districts heretofore acting under special legislation, with as many different provisions as there are cities and districts, under a general and uniform system. The result will be more agitation among the taxpayers, further legislation and more radical constitutional provisions.

A glance at the history of special legislation affecting the three school districts more particularly interested in the 1899 act, will show how strenuously and earnestly the citizens therein have been compelled to insist upon legislation which would restrain officials in the expenditure of public funds, and thus reduce taxation. Their success has been temporary only, because of the determination of these officials to have more money and the disposition of the courts to favor a statute in order to hold it constitutional.

If I understand the prominent and controlling feature of the majority opinion, it is that the provisions in the special act, under which the schools in the city of Minneapolis are governed, having reference to the mode of reporting, or certifying, the levy of taxes

for school purposes, may be repealed, or may be ignored by the county auditor, and yet Laws 1899; c. 70, will remain complete, not requiring any express action authorized by such special act. In other words, independently of this special act, there are adequate existing provisions of the general tax law, as to the "certifying of the levy to the county auditor, the collection of the tax, and payment of the same to the board of education." Substitute the words "city treasurer" for the words "board of education," and the quoted paragraph applies with equal force and relevancy to the St. Paul special act. The provisions of the general tax law referred to are G. S. 1894, §§ 1557, 1576, and 1577, we are informed. The provisions found in the two sections last mentioned have always governed, and no special act has attempted to regulate the manner of keeping accounts in the county auditor's office, or the time when the county treasurer should pay over funds collected for school purposes, and never will. But section 1557 expressly provides that the taxes voted by incorporated cities, villages, townships, and school districts should be certified to the county auditor by the proper authorities on or before October 10 in each year. Unless certified by the proper authorities an auditor would not, and legally could not, make the levy. How would the auditor of Ramsey county, or the auditor of Hennepin county, satisfy himself that the amount of tax alleged to have been voted for school purposes in the St. Paul district, or in the Minneapolis district, had been voted by an authorized body, or had been certified up to him by the proper authorities? In no manner and nowhere except in the special acts of incorporation. In the St. Paul act the matter of school finances and the voting of taxes for school purposes are the exclusive prerogative of the common council of the city, and the amount so voted is certified to the auditor of Ramsey county by the city clerk, presumably, on or before October 10, in the absence of a special provision to the contrary, the sum so voted not to exceed the amount which may be realized by a levy of two and one-half mills on the dollar. Under the Minneapolis act school taxes are voted by the board of education, the maximum levy being four mills on the dollar, and the amount thereof is to be certified or returned to the auditor by the board on or before the first

of November. So that the general provision, section 1557, which is relied upon to save the 1899 legislation, amounts to nothing more, even if it amounts to that, than to fix October 10 as the last day upon which the board of education of the Minneapolis district may report or certify to the county auditor its action under chapter 77. And, singular as it may appear, this board may again, under the special law and under the court's construction of chapter 77, make another report and certificate to the auditor, not later than November 1. Again when the treasurers of those counties are required under the general law to pay over the moneys in their hands, collected for these districts, to whom must they pay, and how are they advised on the subject? In no other manner than by an examination of the special acts. Payment in the St. Paul district is made to the city treasurer, while it is made to the treasurer of the board of education in the Minneapolis district. It seems to me that express action authorized by the special acts, and nowhere else to be found, is required in order to carry out the provisions of the laws of 1899, and that without setting in motion the machinery therein, and in no other law provided, the extra tax cannot be voted, certified, levied, collected, or paid over to the proper officer. The fact is that in the case now before us, as well as in the Johnson case, particular care was taken to follow the very different provisions of the special acts under which the two school districts are operating. I am of the opinion that this case, as was that of *State ex rel. v. Johnson*, is controlled by what was said in *Alexander v. City of Duluth*, 57 Minn. 47, and that opinion was largely rested upon *Fitzgerald v. New Brunswick*, 47 N. J. L. 481.

I might go further in pointing out the necessity of relying on the special laws whenever an attempt is made to vote, levy, and collect this extra tax, but this dissent is already too lengthy. I believe these enactments of 1899 to be opposed to the constitutional provisions, and that belief compels me to state my views in opposition to those of my associates.

FRANK A. SEYMOUR and Another v. BANK OF MINNESOTA and Others.

March 5, 1900.

Nos. 11,798—(173).

**Laws 1895, c. 145, Constitutional.**

Laws 1895, c. 145 (being an act to revise the laws relating to banks of discount and deposit), *held* to be valid, and not in conflict with section 13, article 9, of our state constitution. *Anderson v. Seymour*, 70 Minn. 358, followed.

**Same—Repeal of Right of Bank to Issue Bills.**

*Held*, that by the terms of Laws 1895, c. 145, the right of banks to issue bills under articles of incorporation based upon the general laws of the state previous to that act was revoked and withdrawn.

**Liability of Stockholders.**

The act of 1895, c. 145, reduced the liability of all stockholders in banks organized under the state laws from a double to a single liability after August 1, 1895.

**Renewal of Certificates of Deposit.**

Evidence in this case considered with reference to bank certificates of deposit, and the renewal of the same by issue of new ones in lieu thereof. *Held*, that such transactions constituted new contracts, upon which the statutory liability of stockholders for the debts of the bank is to be based.

**Liability upon Debts Prior to Laws 1895, c. 145.**

The act of 1895 did not reduce the liability of stockholders upon any obligation created between the passage of such act and the time when by its terms it was to take effect. As to such obligations, the double liability under the previous law applied.

Action in the district court for Ramsey county by plaintiffs, as receivers of the Bank of Minnesota, to enforce the individual liability of the stockholders in the bank. The case was tried before Otis, J., who made findings of fact and conclusions of law, and ordered judgment in favor of plaintiffs, as stated in the opinion. From the judgment entered pursuant to such order, plaintiffs and certain of defendants appealed. *Affirmed*.

*Young & Lightner*, for plaintiffs, appellant and respondent.

The stockholders are liable to double the amount of stock held

by them for all debts of the bank. The bank was incorporated in 1882 under G. S. 1878, c. 33, containing provision for double liability (G. S. 1894, § 2501) and passed in compliance with Const. art. 9, § 13. Prior to the enactment of Laws 1895, c. 145, the bank had all the powers of a bank of issue. In *Anderson v. Seymour*, 70 Minn. 358, the court did not pass on the question what is the liability of the stockholders of the bank. Prior to the act of 1895 the stockholders were under double liability. *Allen v. Walsh*, 25 Minn. 543. Whether this liability was also a constitutional liability depends on the construction of the words "in any corporation and joint association for banking purposes issuing bank notes" in Const. art. 9, § 13, subd. 3. These words mean any corporation that is organized to do a banking business and that has power to issue bank notes, and the liability under the constitution is hence double. It was beyond the power of the legislature to reduce this liability as to a bank so organized and remaining so organized. The legislature had no power to alter the charter of the bank without its assent, and if the law of 1895 is construed as attempting to take away the power to issue notes, to that extent it is unconstitutional. The bank had by its charter the right to issue notes. That right is a franchise granted by the state in the charter. *International T. Co. v. American L. & T. Co.*, 62 Minn. 501, 504. The charter of the bank is an executed contract between the state and the corporation, and the legislature, unless the power of amendment is reserved, cannot repeal, impair, or alter such a charter without the assent of the corporation. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 700; *Miller v. State*, 15 Wall. 478. No power to amend the charter was reserved, and the bank never assented to the change. Even if the legislature had the power, it has shown no intention by the law of 1895 to reduce the liability of stockholders in existing banks.

The renewal of certificates of deposit did not operate as payment or discharge of the debts. The certificates of deposit are in legal effect promissory notes. They are not evidence of ordinary deposits, but rather of loans made to the bank. By these certificates "they (the parties) manifest an intention to change the character of the transaction from that of an ordinary deposit to that

of a debt or loan evidenced by an instrument construed to be a promissory note." *Mitchell v. Easton*, 37 Minn. 335. See also *Cassidy v. First Nat. Bank*, 30 Minn. 86; *Francois v. Lewis*, 68 Minn. 409. The new certificates did not operate to pay or discharge the antecedent debt. The fact that the old certificate was surrendered and a new one issued is not material. In either case the certificate is mere evidence of the debt, which remains as before. The rule in a few jurisdictions is that the renewal of a promissory note or other obligation is presumed to discharge the old debt and create a new debt as of the date of the new instrument. Such appears to be the rule in Massachusetts, Maine, Vermont, Indiana and Louisiana. See 2 Daniel, Neg. Inst. § 1259. But that is contrary to the general rule, which is that a simple contract never discharges a precedent debt unless the parties expressly so agree, and the presumption is against such agreement. *Geib v. Reynolds*, 35 Minn. 331, 335; *Good v. Singleton*, 39 Minn. 340; *Egan v. Fuller*, 35 Minn. 515; *Combination S. & I. Co. v. St. Paul City Ry. Co.*, 47 Minn. 207; *Washington Slate Co. v. Burdick*, 60 Minn. 270; *Lambert v. Scandinavian-Am. Bank*, 66 Minn. 185; *Germania Bank v. Michaud*, 62 Minn. 459, 467.

The rule requiring an express agreement supported by strong evidence is not only clearly laid down in Minnesota, but is the settled rule in the United States supreme court and in New York, Wisconsin, Iowa, Indiana, California, West Virginia and other states. *Peter v. Beverly*, 10 Pet. 532; *The Kimball*, 3 Wall. 37, 45; *The Bird of Paradise*, 5 Wall. 545; *Segrist v. Crabtree*, 131 U. S. 287; *The Emily Souder*, 17 Wall. 666; *Embrey v. Jemison*, 131 U. S. 336; *Lee v. Hollister*, 5 Fed. 752; *Downey v. Hicks*, 14 How. 240, 249; *The Agnes Barton*, 26 Fed. 542; *Muldon v. Whitlock*, 1 Cow. 290; *Porter v. Talcott*, 1 Cow. 359; *Tobey v. Barber*, 5 Johns. 68; *Jagger v. Walker*, 76 N. Y. 521; *Board v. Fonda*, 77 N. Y. 350; *City v. Phelps*, 86 N. Y. 484; *Blunt v. Walker*, 11 Wis. 349; *Lindsey v. McClelland*, 18 Wis. 505; *Matteson v. Ellsworth*, 33 Wis. 488; *First National v. Case*, 63 Wis. 504; *Allis v. Meadow*, 67 Wis. 16; *Willow v. Luger*, 102 Wis. 636; *Hunt v. Higman*, 70 Iowa, 406; *Cushwa v. Improvement*, 45 W. Va. 490; *Dingley v. McDonald*, 124 Cal. 90; *Merrick v. Boury*, 4 Oh. St. 60; *Leach v. Church*, 15 Oh. St. 169;



*Godfrey v. Crisler*, 121 Ind. 203; *Fry v. Patterson*, 49 N. J. L. 612; *Bristol v. Probasco*, 64 Ind. 406. In the following cases the new obligations were given in exchange or renewals for old obligations, which were surrendered to the debtor, and it was expressly held that the new obligation was not a payment, and that the surrender of the old obligation was not evidence of an agreement that the new obligation paid the old. *Peter v. Beverly*, supra; *Lee v. Hollister*, supra; *Jagger v. Walker*, supra; *City v. Phelps*, supra; *First National v. Case*, supra; *Allis v. Meadow*, supra; *Cushwa v. Improvement*, supra; *Welch v. Allington*, 23 Cal. 322; *Bristol v. Probasco*, supra; *Bank v. St. John*, 25 Ala. 566; *Crocket v. Trotter*, 1 Stew. & P. 446; *Fry v. Patterson*, supra. The rule that renewals are not payment has been applied in several cases where the action was brought to enforce stock liability. *Jagger v. Walker*, supra; *Dingley v. McDonald*, supra; *Bank v. St. John*, supra. See also *Bristol v. Probasco*, supra; *Lee v. Hollister*, supra. See also *Harper v. Carroll*, 66 Minn. 487, where the contention was not made.

The renewal of certificates of deposit after August 1, 1895, did not operate to release the double liability. Defendants to prevail must maintain two propositions: (1) That the extension was without their consent and their want of consent has been affirmatively proved (*Harper v. Carroll*, supra); (2) that they were sureties. The stockholders must be deemed to have consented to the renewals, particularly as they made no inquiries or objections. They were represented by the corporation and its officers, and acting by them they consented to the renewals. *Holland v. Duluth Iron M. & D. Co.*, 65 Minn. 324, 331. This court has not, as far as we have been able to ascertain, ever adopted the rule of strict construction. *National N. H. Bank v. N. W. Guaranty L. Co.*, 61 Minn. 375. The stock liability is contractual. *Hanson v. Davison*, 73 Minn. 454. See also *Hencke v. Twomey*, 58 Minn. 550. The rule sustained by the great weight of authority is that the liability is like that of a partner, original and for the stockholder's own debt, and not that of a surety nor entitled to the peculiar rights of suretyship. *Taylor, Corp.* §§ 714, 715; 2 *Morawetz, Corp.* § 879; *Richmond v. Irons*, 121 U. S. 27, 56; *U. S. v. Knox*, 102 U. S. 422, 425;

*Hobart v. Johnson*, 19 Blatch. 359; *Witters v. Sowles*, 32 Fed. 130; *Harger v. McCullough*, 2 Denio, 119; *Moss v. Averell*, 10 N. Y. 449; *McVickar v. Jones*, 70 Fed. 754; *Hatch v. Burroughs*, 1 Woods, 439; *Coleman v. White*, 14 Wis. 762; *Schalucky v. Field*, 124 Ill. 617, and cases cited; *Sonoma v. Hill*, 59 Cal. 107; *Appeal of Aultman*, 98 Pa. St. 505. This court in defining the nature of the stockholder's liability has followed the general rule. *Mohr v. Minnesota Ele. Co.*, 40 Minn. 343; *Hanson v. Davison*, *supra*. The rule is uniform that a stockholder is not released from his constitutional or statutory liability by an extension of time of payment of a corporate debt without his consent, except in those few states in which he is held to be merely a surety. *Harger v. McCullough*, *supra*; *Moss v. Averell*, *supra*; *Hobart v. Johnson*, *supra*; *Hatch v. Burroughs*, *supra*; *Sonoma v. Hill*, *supra*; 3 *Thompson, Corp.* § 3077; *National v. Gay*, 57 Conn. 224; *McDonnell v. Alabama*, 85 Ala. 401.

*Hadley & Armstrong*, for respondents Wilson and Smith.

The stockholders are only liable, in an amount equal to the amount of stock held by them, for the debts of the bank which have accrued since Laws 1895, c. 145, went into effect. The bank was not in 1895 a corporation "issuing bank notes." It does not follow that because the bank was organized in 1882 under G. S. 1878, c. 33, it was organized for the purpose of issuing bank notes, or that it had power to issue them. See Laws 1869, c. 85. It was as much a prerequisite to such power that it should deposit securities as provided in G. S. 1878, c. 33, § 4, as that it should be properly incorporated. Before it deposited such securities it was authorized to do the ordinary deposit and discount business, but not to issue bank notes. Never having made such deposit, it was not only not a bank "issuing bank notes," but it was not a bank authorized or that had the power to issue them. Even if it was so organized that prior to the passage of Laws 1895, c. 145, it might have become a "bank of issue" by depositing securities, it had no such right after the passage. That law repealed the provisions authorizing banks to issue circulating notes. The bank had no contract with the state that it should have power to issue bank notes. See G. S.

1866, c. 33, § 13, as amended (G. S. 1894, § 2493). There is no contract between the state and a corporation by virtue of its charter until the corporation shows its acceptance of the charter. It cannot be said that a bank which has not made such deposit has accepted a charter granting power to issue bank notes. The offer of the state, unaccepted, is not a contract, and the state may withdraw the offer by amending or repealing the statute. *Cincinnati v. Clifford*, 113 Ind. 460; *Matter of N. Y. Cable Ry. Co.*, 40 Hun, 1; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646. The receivers cannot raise the question of the unconstitutionality of Laws 1895, c. 145, on the ground that it impairs the obligation of a contract between the bank and the state. Only a party to the contract can raise the question. *Currier v. Elliott*, 141 Ind. 394; *Sullivan v. Berry*, 83 Ky. 198; *Hagar v. Reclamation District*, 111 U. S. 701-712. This court has already decided that a bank organized under chapter 33, which has not actually issued notes, is not a bank issuing notes. *Allen v. Walsh*, 25 Minn. 543; *Anderson v. Seymour*, 70 Minn. 358.

The debts of the bank represented by certificates of deposit issued since August 1, 1895, are not debts that existed prior to that date. These certificates are negotiable paper, and in many respects are governed by the same rules as ordinary promissory notes and bills of exchange. *Cassidy v. First Nat. Bank*, 30 Minn. 86; *Mitchell v. Easton*, 37 Minn. 335; *Francois v. Lewis*, 68 Minn. 409. Whether giving a bill or note operates as absolute or merely as conditional payment of a pre-existing debt depends on the intention of the parties. 2 Daniel, Neg. Inst. § 1259; Leake, Cont. 893. The rule which prevails in England and in many of the states, including Minnesota, is that, where it is shown that a bill or note is given for a pre-existing debt and nothing further appears, the presumption is that it was intended merely as conditional payment, but this presumption may be overcome by proving either an express agreement or an agreement, to be implied from the circumstances, to the contrary. Leake, Cont. 893; 2 Daniel, Neg. Inst. § 1259; Story, Prom. Notes, § 104; *Geib v. Reynolds*, 35 Minn. 331; *Combination S. & I. Co. v. St. Paul C. Ry. Co.*, 47 Minn. 207; *Wiley v. Dean*, 67 Minn. 62. It has frequently been inaccurately stated

that the presumption is in favor of conditional payment unless an express contract to the contrary is proved, leaving it to be inferred that such contract cannot be implied from the circumstances. *The Kimball*, 3 Wall. 37, 45; *Lyman v. President*, 12 How. 225, 243; *Case Mfg. Co. v. Soxman*, 138 U. S. 431; *Geib v. Reynolds*, *supra*. The great weight of authority is in favor of the rule applied in *Wiley v. Dean*, *supra*, that the presumption of conditional payment may be overcome by showing the intention of the parties from the circumstances surrounding the transaction as well as by proving an express contract. *Leake*, Cont. 893; 2 *Daniel*, Neg. Inst. § 1268; *Story*, Prom. Notes, § 104; *Tiedeman*, Com. Paper, § 380; *Johnson v. Cleaves*, 15 N. H. 332; *Hart v. Boller*, 15 Serg. & R. 162; *Belleville v. Bornman*, 124 Ill. 200; *Macomber v. Macomber* (R. I.) 31 Atl. 753; *Hotchin v. Secor*, 8 Mich. 494; *Craddock v. Dwight*, 85 Mich. 587; *Haines v. Pearce*, 41 Md. 221.

Again, a certificate of deposit is more than a promissory note. The certificate is not only evidence of a promise to pay; it is also evidence that the payee has made a deposit, and of its terms (*Francois v. Lewis*, *supra*); and it may well be that, even if in the case of an ordinary promissory note the presumption is that it is not intended as satisfaction of the debt, yet there is no such presumption in the case of a certificate of deposit. *Manuel v. Mississippi*, 2 Pa. St. 198. But, whether or not such a distinction exists, the circumstances here show the intention of the parties that the old contracts were extinguished and that the new certificates should take the place of the old. The fact that the old notes are surrendered is sufficient evidence of payment to allow the question of intention to go to a jury. *Hart v. Boller*, *supra*; *Cake v. First National*, 86 Pa. St. 303; *Brown v. Dunckel*, 46 Mich. 29; *Flower v. Elwood*, 66 Ill. 438; *Wells v. Robb*, 9 Bush, 26; *Beach v. Endress*, 51 Barb. 570; *Chase v. Brundage*, 58 Oh. St. 517. The certificate states that a certain amount of money has been deposited as of that date, and it is evident that the parties intended to place themselves in the same relation to each other as if the holder had actually drawn out the cash and redeposited it. Where the circumstances show that parties intend to assume the relation in which they

would be, had they actually passed money back and forth, the law will treat it as having been done. *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Mayer v. Heidelberg*, 123 N. Y. 332.

Another feature tending to show the intention is that it was for the advantage of the holder to surrender his old contract and make a new deposit, for, under the terms of the certificates, they do not draw interest after six months. Again, the holder of the certificate in each instance had his option to take cash if he chose to do so; and, for his own convenience, preferred to take a new certificate. The fact that the bank was open and doing business was in effect an offer to pay cash, and in each instance the person who presented a certificate was asked whether he wanted cash or a new certificate. Where, under such circumstances, a person takes negotiable paper, it is presumed to be in payment and extinguishment of the old debt. *Leake*, Cont. 894; *Benjamin*, Sales, § 731; *Marsh v. Pedder*, 4 Camp. 257; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferrand*, 7 B. & C. 19; *Robinson v. Read*, 9 B. & C. 449; *Guardians v. Greene*, 1 H. & N. 884. Moreover, in every case when the new certificates were dishonored the holders retained them and made their claim against the receivers upon the last certificates. Treating the old debt as extinguished, subsequently to the transaction, has been held to be evidence of the intention of the parties at the time. *Strong v. Hart*, *supra*; *Hotchin v. Secor*, *supra*.

Even conceding, for the purposes of argument, that the taking of new certificates since August 1, 1895, in lieu of the old ones of prior date, merely extended the time of payment of the original debt; still this extension was made without the consent of the stockholders, and thereby they were released from their liability to pay the second amount equal to the amount of their stock. The liability of a stockholder in addition to the stock itself is that of a guarantor or surety, the corporation being the principal debtor and primarily liable. The liability of stockholders rests upon G. S. 1894, § 2501. This section must be read in connection with chapter 76, which provides how this liability of stockholders may be enforced (sections 5905-5907, 5909-5911). These sections, as construed, provide that this liability can only be enforced in case the corporation is insolvent, and only for the amount of indebtedness

remaining after exhausting the assets of the bank; and it must be enforced by a suit for the benefit of all creditors. Laws 1895, c. 145, has been construed to mean that the receiver may enforce the liability in accordance with the provisions of G. S. 1894, c. 76. *Ueland v. Haugan*, 70 Minn. 349; *Anderson v. Seymour*, 70 Minn. 358. Section 2501 and chapter 76 were enacted at the same time and must be construed together. *Allen v. Walsh*, 25 Minn. 543; *Hanson v. Davison*, 73 Minn. 454; *Willis v. Mabon*, 48 Minn. 140. The stockholders are only liable for the debts of the corporation after exhausting the property of the corporation itself. *Harper v. Carroll*, 66 Minn. 487, 498; *Minneapolis Paper Co. v. Swinburne P. Co.*, 66 Minn. 378. The liability of the stockholder is that of a surety. *Hanson v. Donkersley*, 37 Mich. 184; *Wright v. McCormack*, 17 Oh. St. 86; *Patterson v. Wyomissing*, 40 Pa. St. 117; *Perry v. Turner*, 55 Mo. 418; *Malloy v. Mallett*, 6 Jones, Eq. (N. C.) 345; *Southmayd v. Russ*, 3 Conn. 52; *Ball v. Child*, 68 Conn. 522; *Moss v. McCullough*, 5 Hill, 131; *Close v. Potter*, 155 N. Y. 145, 155; *Hicks v. Burns*, 38 N. H. 141.

Even if the relation of the stockholder to the creditor is that of principal debtor, and his liability is primary and not secondary, yet he is released by the creditor giving time to the corporation without his consent. In case two persons are jointly liable as principals to a third, but by some agreement one is bound to pay the whole debt, and the creditor knowing this fact grants an extension of time to one debtor, without consent of the codebtor, the creditor thereby releases such codebtor. *Hubbard v. Gurney*, 64 N. Y. 457. To the same effect are: *Lime Rock v. Mallett*, 34 Me. 547, 42 Me. 349; *Piper v. Newcomer*, 25 Iowa, 221; *Riley v. Gregg*, 16 Wis. 697; *Bank v. Smith*, 30 Vt. 148; *Brandt*, Sur. § 17; *Leake*, Cont. 463; *Agnew v. Merritt*, 10 Minn. 242 (308). See further: *Millerd v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 N. Y. 95; *Palmer v. Purdy*, 83 N. Y. 144; *Travers v. Dorr*, 60 Minn. 173; *Calvo v. Davies*, 73 N. Y. 211; *Harger v. McCullough*, 2 Denio, 119.

*Davis, Kellogg & Severance*, for defendants, appellant and respondent.

*Charles J. Berryhill*, respondent, pro se.

LOVELY, J.

Plaintiffs were appointed by the district court of Ramsey county receivers of the insolvent Bank of Minnesota, a banking institution incorporated under the laws of this state. Its assets are insufficient to meet its obligations, and this action is brought by the receivers to enforce the individual liability of the stockholders, under Laws 1895, c. 145.

The plaintiffs claim the right to enforce against each of such stockholders a liability for double the amount of his holdings of stock, which, by reason of the insolvency of many stockholders, and the deficiency of assets, is claimed to be necessary to secure payment of its debts. The defendants resist the enforcement of the double liability, and contend that all but a limited amount of the indebtedness was actually incurred after the provisions of chapter 145 took effect, and that the liability of the stockholders is reduced by the terms of that act from a double to a single liability; and this, as we view it, is the real contention in this case.

It was not disputed that, if the statute referred to in all respects applied, it did reduce the liability of the stockholders as claimed; but it was urged by counsel for receivers on the trial below, as well as in this court, that certain provisions of this statute did not control this question, but were in violation of section 13, article 9, of the state constitution, which left the previous enactment (G. S. 1894, § 2501), providing for a double liability in such cases, in full force. It is also a serious contention by the receivers that a large part of the indebtedness of the bank, amounting to over \$533,000, represented by certificates of deposit allowed and found as claims, were renewals of other certificates that had been issued before August 1, 1895, and that for such reason the liability of the stockholders was not changed by the renewals from a double to a single liability. Upon both of these questions the trial court held adversely to the receivers, and ordered judgment against the stockholders for the indebtedness mentioned above, only for an amount equal to the holdings of each stockholder, which judgment was duly entered. In the judgment it was also ordered that to the extent of \$27,000, in round numbers (being indebtedness which accrued previous to August 1, 1895, when the single-liability statute

went into effect), the stockholders were liable in double the amount of their shares.

Both parties have appealed from the judgment to this court, and, in the view which we take of the legal issues presented by the respective appeals, there are three propositions before us for our determination, viz.:

1. Was the act of 1895 constitutionally operative upon the previous double-liability provisions of the banking law of this state?

2. Was the conclusion of the trial court, to the effect that the renewal certificates constituted new obligations subsequent to the act of 1895, supported by the evidence?

3. Was the portion (about \$2,000) of the \$27,000 indebtedness which accrued between the passage of the act of 1895 and the time when it took effect by its terms a claim that could be enforced against the stockholders under the single or double liability act referred to?

1. The theory of the receivers is that the Bank of Minnesota, which was organized in 1882, under chapter 33 of the general statutes, was a bank of issue, having a right to put forth its bank notes, and, although it never had in fact exercised that power, it was authorized to do so, and by the provisions of the constitution (article 9, § 13, subd. 3), which imposed a double liability upon its stockholders, it was in terms declared that the general banking law to be provided for thereunder should apply only to banks "issuing bank notes," whose stockholders should be "individually liable in an amount equal to double the amount of stock owned by them for all the debts of such corporation or association"; and the question here on this contention simply is whether the provisions of Laws 1895, c. 145, in reducing the stockholders' liability, conflict with this constitutional restriction.

The answer to this question concededly turns upon the effect to be given to the words restricting the liability clause in the constitution to banks "issuing bank notes"; for the organic law does not apply in such restriction to banks of discount and deposit, and if the Bank of Minnesota was not a bank of issue, or its right to issue bank notes was taken from it, the later act upon the subject repealed the former, or those provisions thereof which were incon-



sistent with it. It is a matter of common knowledge, of which this court will take notice, that neither the Bank of Minnesota nor any other bank in this state has issued bank notes since the establishment of the national banking system, and the tax imposed thereby upon the circulation of bank bills as currency; and the Bank of Minnesota at no time since its organization has been a bank, within the literal terms of the organic law, "issuing bank notes." But it is urged that it might, having the power to exercise this privilege, break the ban, and by issuing its notes exercise that right, for the purpose of asserting its constitutional authority, and creating a subsequent liability thereby. We think that this is probably true, unless by the terms of the act of 1895 the power to issue bank notes has been, by necessary implication, withdrawn and revoked.

By the act of 1895 the banking laws of this state are carefully revised, and it is provided by section 1 of that statute that the banks to be thereafter established shall be banks of "discount and deposit,"—not authorizing in any of its provisions, either in terms or impliedly, a right to issue bank notes; and it is further provided in section 29 thereof that

"The powers, privileges, duties, and restrictions conferred and imposed upon any bank existing and doing business under the laws of this state are hereby abridged, enlarged, or modified, as each particular case may require, to conform to the provisions of this act."

To give proper scope and effect to this last provision, it must be held to abridge the power to issue bank notes conferred by the law under which the Bank of Minnesota was organized; and the question still follows, does such change restrict the charter or acts of incorporation under which the Bank of Minnesota was incorporated? It may be conceded, for the purpose of argument, that, if the power to issue bank notes had been exercised by the bank, it would not have been within the constitutional authority of the state to abridge or withdraw that right; but we do not think it can be held, upon sound principles of public policy, that an unused power, depending upon legislative sanction, when no contractual relations have been imposed, creates such a vested privilege that it

cannot be withdrawn by the authority from which it emanated; and when, by the terms of Laws 1895, c. 145, the power to issue bills was withdrawn, the Bank of Minnesota became only a bank of discount and deposit, not controlled by the constitutional restriction referred to, but subject to legislative control; and it follows that its stockholders' liability might be regulated, reduced, or increased thereby. *Allen v. Walsh*, 25 Minn. 543, 548.

The right to regulate the banking institutions of the state yields in importance to no other subject of legal control, for the interests involved are vast in their magnitude; they touch every enterprise and reach every hearthstone; and, in view of the varied and extensive interests concerned, there is no other object of state regulation which calls for a more ample exercise of legislative guardianship, or is better justified by the dictates of reason or sound public policy. In view of these large considerations of public importance, we are of the opinion that it was competent for the legislature to revoke the unused authority of the banks in this state to issue their notes for circulation; and that such was the effect of Laws 1895, c. 145, we have no doubt. This conclusion is supported in principle by the high authority of the supreme court of the United States. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714.

We have stated our views upon this portion of the case the more fully out of respect for the contention of the able counsel for the receivers, who insist with much force and learning that this is still an open question; but we are satisfied that this controversy has already been considered by this court, and that a careful review of the arguments and opinions in a recent case where these receivers were parties will show that the trial court was right in resting its decision upon the rule of *stare decisis*. *Anderson v. Seymour*, 70 Minn. 358, 73 N. W. 171.

2. The trial court held that, of the large indebtedness of the bank, \$533,300.53 represented the amount of certificates of deposit which were renewals of other certificates outstanding prior to August 1, 1895, and that with reference to such certificates renewed after that date, when the stockholders' liability was reduced, there

was an "unconditional surrender" by each holder, "and the acceptance by him of a new certificate, without other circumstances showing an intent that the old contract should remain in force, which creates a new and independent contract," and ordered judgment for an amount equal only to the face value of such obligations.

The evidence to support this conclusion of the court below shows that the bank was at the time of the renewals open, apparently solvent, and doing business according to the usual custom of banks; that when the old certificates, which were obligations bearing interest for six months, were presented, by their terms they ceased to bear interest; that the holders were given the option to have their money, but that they chose to take new certificates, which bore interest for six months longer. In many cases a part was paid, or the interest only, according to the choice of the holder. In view of the "common understanding" in such cases, the court held that the new certificates evidenced a new contract, upon which the rights of their owners must be based; and the owners themselves, in filing their claims, seem to have adopted that view at the trial, since such claims were rested upon the certificates issued after August 1, 1895. We think the evidence in this respect is sufficient to sustain the conclusion reached by the court below.

It is urged, upon the analogy supposed to exist between such certificates and negotiable notes between private parties, that the rule has been established that the giving of a new note does not, without express agreement, discharge the old obligation, which is the law of this state. *Geib v. Reynolds*, 35 Minn. 331, 335, 28 N. W. 923. But this analogy is more seeming than real, and the parallel ends with the reason for the rule, which is that, in the case of transactions between individuals, new notes for the old debts are mere extensions for the benefit of the debtor solely, and by favor of the creditor; and, in the cases on this subject in this court where the rule has been applied, it has been held that a new note may be received as a payment, or, to adopt the language of the learned trial judge, as an "independent contract," if such is the intention of the parties, and that the intention which controls in that respect is to

be drawn from the evidence consisting of the circumstances of each case. *Keough v. McNitt*, 6 Minn. 357 (513); *Goenen v. Schroeder*, 18 Minn. 51 (66); *Geib v. Reynolds*, *supra*; *Combination S. & I. Co. v. St. Paul City Ry. Co.*, 47 Minn. 207, 49 N. W. 744; *Hanson v. Tarbox*, 47 Minn. 433, 50 N. W. 474; *Wiley v. Dean*, 67 Minn. 62, 69 N. W. 629.

And it would seem to follow, when the reason for the rule referred to is considered, as well as the circumstances that entered into the transactions of the bank with its certificate holders, that the court would not have been justified in going behind the face of the certificates themselves; for, when such certificate was presented at its counter, the bank was ready in each case to pay it in money, and if the certificate had been presented, properly indorsed, by a mute, without a word, the teller would either have counted out the funds to take it up, or committed an act of insolvency for the bank; or if the certificate holder had taken his money and gone to another bank, and taken a new certificate there, or if at the same bank he had taken his money from the teller, and again returned it for a new certificate, there would be no question as to the nature of such a transaction. Concededly, they would constitute new and independent contracts. And we think this is precisely what the certificate holders, with their option to take the money or reloan it for new interest, which they would not have had if the certificates had not been renewed, did, although it was done by a business "short cut," which implies all that the court below found to be within the "common understanding" prevalent in such cases; and we think, in this respect, the judgment must be sustained.

3. Upon the cross appeal of the stockholders, the claim is made that of the certificate indebtedness which had not been renewed prior to August 1, 1895, amounting to over \$27,000, in round numbers, some \$2,000 of such certificates were issued after the act was approved (April 15, 1895), but before the day when by its terms it was to take effect (August 1 of same year). The trial court held that upon all certificates issued before the statute took effect the liability of the stockholders was double, as if Laws 1895, c. 145, had not been passed. We think that in this respect the trial court was

clearly right. It is true that such creditors entered into their contracts with the bank after the act of 1895 had been approved, and had full notice that it would go into effect on August 1 thereafter; and it is urged for that reason that the act reducing the stockholders' liability became a part of all contracts entered into with the bank in the meantime. This is plausible, but not satisfactory; for the controlling fact still remains that by the laws of the state in force when the contract was made, and which necessarily became a part thereof, the stockholders were liable for the debts of the corporation in a sum double the amount of the par value of the stock holdings of each.

The judgment of the court below is affirmed.

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THOMAS GALLAGHER v. IRISH-AMERICAN BANK and Others.

March 5, 1900.

Nos. 11,879—(183).

**Judgment—Material Modification—G. S. 1894, § 5267.**

In an action against stockholders to recover for creditors, under G. S. 1894, § 5903, a motion to modify the judgment, after it has been entered, so as to change the amounts distributed to each of such creditors, is authorized solely by the provisions of G. S. 1894, § 5267.

**Modification during Time for Appeal.**

Before the time for taking an appeal from such judgment has expired, the court in which it was entered has authority, under such statute, upon cause shown, to modify, vacate, or set aside the same.

**Modification after Time for Appeal.**

But such right is limited in time to six months (except in cases of mistake, surprise, etc., otherwise provided for in the statute) after the entry of such judgment, and the same in all respects becomes *res judicata* after such period has expired.

Action in the district court for Hennepin county to enforce the liability of stockholders in defendant bank. Judgment was entered in favor of plaintiff and the intervening creditors, determining and adjudging the liability of the stockholders. From an order

denying a motion to modify the judgment, W. D. Hale, as receiver of the American Savings & Loan Association, one of the intervening creditors, appealed. Affirmed.

*Hay & Van Campen*, for appellant.

*Fred W. Reed, Wm. H. Donahue, S. Meyers, Weed Munro and George R. Robinson*, for respondents.

LOVELY, J.

The Irish-American Bank became insolvent, and made an assignment under the insolvency laws of this state. Its avails liquidated only 35 per cent. of its debts in that proceeding, and this action was brought by plaintiff for himself and other creditors, under the statute (G. S. 1894, § 5903, et seq.), to recover from the stockholders the deficiency. Some time after the commencement of this action, W. D. Hale was, upon proper cause, permitted to intervene therein for the American Savings & Loan Association, and, setting up a claim for that company, asked to be allowed to participate in the benefits of the pending suit. Such proceedings were had that the stockholders were held liable to the creditors of the bank for double the amount of their respective holdings of stock, for debts due before August 1, 1895, and for an equal amount thereafter, which latter rating of liability was based upon the statute (Laws 1895, c. 145), changing the obligation of stockholders for corporate debts by its terms from double to single liability, to take effect after July 31 of that year.

A referee was appointed to ascertain and report the facts as to number of stockholders and creditors, the amount of respective liabilities, as well as claims of each, and upon the report of such referee—which was accepted—the court determined as a conclusion of law, inter alia, “that there is due from the Irish-American Bank to plaintiff and each of said creditors sixty-five per cent. of the sum set opposite his name in said Schedule B” (which contained the names of all the creditors reported by the referee), except the amount due upon the claim represented by the intervenor, which was substantially reduced in amount, and a stay of thirty days was granted, after which judgment was ordered to be entered upon the findings of the court.

October 21, 1898, judgment was duly entered in favor of the plaintiff and intervening creditors for an aggregate indebtedness of \$192,420.03, of which amount \$75,096.35 was adjudged to have accrued before the stockholders' liability had been reduced by the statute referred to. By this judgment the stockholders were, in terms, held to the creditors of the bank for double the amount of their stock, where the debts accrued before the statute took effect; and in cases of transfers the transferrors were held secondarily liable for a like amount; and it was further adjudged that the liability of all stockholders should be one-half of the amount of their estimated pro rata obligations previous thereto on debts accruing after the statute took effect. The defendant W. H. Donahue was appointed receiver to collect and distribute all moneys by enforcement of the judgment, and now has in his hands in round numbers \$29,000, to be divided among the creditors. A large portion of this sum was obtained from stockholders on account of debts incurred before August 1, 1895, when their double liability was reduced one-half by the statute; but in the judgment no distinction was recognized in the amounts which any of the creditors were to receive whether his claim existed before or after the change in the liability. All were adjudged to share alike pro rata to the extent of 65 per cent. of the sums collected of the stockholders according to the schedule, which in this respect follows the conclusions of the court *ipsissimis verbis*, and in the concluding paragraph such judgment provides that the court may

"Make any further order necessary for the furtherance of justice or equity not inconsistent herewith."

It does not appear from the return that any objection was made to the judgment for any cause until eight months and more after the same was entered of record, when, upon an order to show cause, based upon affidavits of counsel setting out in detail the facts heretofore stated, it was, in behalf of the intervenor, moved

"That the records and judgments herein be modified, amended, and corrected by adjudging the existing creditors who were creditors on the 31st day of July, 1895, entitled to share pro rata, and to the exclusion of all other creditors, in 50 per cent. of the fund in the

hands of the receiver herein, and further to share pro rata with all other creditors in the residue of said fund," etc.

This motion, after hearing, was denied by the court below, and it is from the denial thereof that this appeal brings the correctness of such order into this court for review.

Appellant contends, in brief, that the right of the creditors of the time when the stockholders' liability was double involves contractual relations between them and the creditors whose debts were also of the same time, and, in consequence, a double benefit on that account should inhere to such creditors, of whom intervenor was one. This claim is strenuously resisted upon several grounds; among others, that the judgment is final or *res judicata* of this question, and that it is too late to amend and modify its terms so as to change the distributive share of the interested parties; which claim, if well taken, disposes of this appeal, and dispenses with the necessity of considering other points discussed by respondents.

It was urged for appellant that the terms of the judgment authorizing the court to "make any further order necessary for the furtherance of justice or equity" *ex vi termini* justified the relief sought, which was claimed to be only a modification or correction of the original judgment, instead of a radical change in its substance. We cannot assent to this view. The authority to "modify, amend, and correct," contained in the judgment, is limited to matters "not inconsistent therewith," and there is no charm in the legal use of any word that separates from it the real essence of the purpose sought by its use. The object in this case to be accomplished by the motion was to change the rate of distribution already adjudged, which would materially increase or decrease the amount of each creditor's pro rata share from the judgment which had been entered in his favor eight months before. It seems to us that such an order would be inconsistent with the terms of the decree already entered, and would constitute such a change in the substantial rights of the parties as upon principle could not, after judgment, be accomplished under the equitable rules which have been invoked in aid of appellant. Clearly, under the authorities



applicable in such cases, the course of the aggrieved parties, there being no mistake of fact, but entirely of legal right, was by appeal, and, but for the statute, to which we shall presently refer, there was no other remedy available after the entry of judgment. 2 Daniell, Ch. Pr. § 1030; *Grant v. Schmidt*, 22 Minn. 1; *Semrow v. Semrow*, 23 Minn. 214.

Subsequent to these decisions, which prohibited interference with a judgment save by appeal, the legislature provided in express terms that a judgment might be modified or set aside by the court upon good cause shown. Amendment by Laws 1876, c. 219. See *G. S. 1894*, § 5267; *State S. & D. Mnfg. Co. v. Adams*, 47 Minn. 399, 401, 50 N. W. 360; *Beckett v. N. W. Masonic A. Assn.*, 67 Minn. 298, 301, 69 N. W. 923. The relief sought by appellant is of such a character that it must be held, in view of this statute, and the authorities which construe it, that the judgment could, within the time limited for taking an appeal, be changed, modified, or set aside; hence the only question which remains upon this contention is whether the six-months limitation for an appeal from a judgment (*G. S. 1894*, § 6138) foreclosed the rights of a party from that course of procedure afterwards. It would seem as if some limitation should, for practical purposes, be placed upon the exercise of the power of the courts to modify or change their judgments. In the opinions of this court in *State S. & D. Mnfg. Co. v. Adams* and *Beckett v. N. W. Masonic A. Assn.*, supra, the applications were made before the time for appealing had expired, and this fact was noted in each case as of significance, although it was not necessary to their determination. In this case time for appealing had expired when the motion was made in which the same result was sought as would have been secured by appeal from the judgment.

We cannot believe that it was intended by the legislature, in the amendment referred to, to leave open until the limitation upon the judgment itself had run the means of reversing or setting it aside, or effectually to destroy the effect of the provision of law which limits the time within which appeals from judgments may be taken; for where a judgment that has settled questions of the highest importance could not, by reason of the limitation upon the time for appeal, be reviewed, if such a rule obtained, it could

easily, upon a motion supported upon ex parte affidavits, be modified or set aside. The effect of such a ruling would be practically to nullify or repeal the statutory limitation of time for taking appeals from judgments, and, as a precedent, result in such confusion in practice, and work such havoc to vested rights accruing under the highest judicial sanction known to the law, that we cannot approve of so obviously unjust and illogical a conclusion; and we hold that, when the effort to modify or amend the judgment in this case was made, the time to appeal having expired, it was too late to grant the relief sought. *Barheydt v. Adams*, 1 Wend. 101.

We have not overlooked in this decision the provision of the statute that gives the court the right, in its discretion, at any time within one year after notice to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. But these were clearly not the grounds of the application in this case, where the claims of the intervenor were rested upon considerations of legal right wholly, and presented such an issue as would, but for the amendment to the statute, have been reached only by appeal; and within the views expressed above it follows that, as soon as the six months from the entry of judgment had run, within which time appellant might have presented his contention in this court by appeal, such judgment, as against a motion for the same purpose, became final and conclusive, and was *res judicata* of all questions that were or might have been urged against it before that time. See *Manwaring v. O'Brien*, 75 Minn. 542, 81 N. W. 746. This inexorable but just rule is necessary to the authority of courts to declare the law, and vitalizes their judgments with the force that gives to them efficacy.

Order affirmed.

**AARON GOTTSTEIN v. JOSEPH ST. JEAN.**

April 6, 1900.

Nos. 11,979—(125).<sup>1</sup>

**Order of Dismissal not Appealable.**

Appeal dismissed, because taken from a nonappealable order.

Appeal by defendant from an order of the district court for Ramsey county, Otis, J. Dismissed.

*S. P. Crosby*, for appellant.

*Philip Gilbert*, for respondent.

**PER CURIAM.**

Appeal from an order of the district court dismissing the action for want of prosecution; in effect an order for judgment in defendant's favor for his costs and disbursements. As early as 1872 this court held that an appeal would not lie from an order of dismissal (*Searles v. Thompson*, 18 Minn. 285 [316]), and this rule has been adhered to ever since. The point has not been made by respondent's counsel, but this is immaterial. *U. S. Savings, L. & B. Co. v. Ahrens*, 50 Minn. 332, 52 N. W. 898.

Appeal dismissed.

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**D. W. CHAMBERLAIN v. HARRY BRADLEY and Another.**

April 6, 1900.

Nos. 11,992—(93).

**Assignment of Error—Appeal from Justice Court.**

On appeal from a judgment of the district court affirming a judgment rendered by a justice of the peace, it is insufficient to assign as error a ruling made by such justice.

Appeal by plaintiff from a judgment of the district court for Mower county, entered pursuant to the order of Kingsley, J., and

<sup>1</sup> April, 1900, term.

affirming a judgment of a justice of the peace in favor of defendants. Affirmed.

*G. W. W. Harden*, for appellant.

*J. F. Trask and Greenman, Dowdall & Greenman*, for respondents.

PER CURIAM.

On questions of law alone plaintiff appealed to the district court from a judgment rendered against him in justice's court for defendant's costs and disbursements. In district court the judgment was affirmed by order, and from a judgment thereon entered plaintiff appeals. The only error assigned by counsel is,

"The justice erred in dismissing the action as to Mary Bradley."

This is clearly insufficient, for errors must be specified as to rulings of the district court, not as to rulings made by the justice. To illustrate why this should be the rule, the district court may have agreed with counsel upon this very claim, and yet have affirmed the judgment upon other grounds. Although counsel for defendants called attention to this defect in their brief, no application has been made for the relaxation of the rule as to assignments of error, and plaintiff's counsel has made no effort to comply with it by amendment or otherwise. The judgment must, therefore, be affirmed, but, in view of all of the circumstances, it is ordered that no statutory costs be taxed against plaintiff.

Judgment affirmed.

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N. T. DAVIES v. J. P. VON BERG.

April 12, 1900.

Nos. 12,046—(28).

**Return upon Appeal—Judgment not Sustained by Evidence.**

*Held*, that it appears from the return made by a justice of the peace on an appeal from a judgment on questions of law alone that all of the evidence given at the trial was certified up to the district court, and that such evidence was insufficient to warrant a judgment in plaintiff's favor.

Appeal by plaintiff from a judgment of the district court for

Freeborn county, entered pursuant to the order of Kingsley, J., and reversing a judgment of a justice of the peace in favor of plaintiff. Affirmed.

*J. A. Sawyer*, for appellant.

*H. H. Dunn*, for respondent.

PER CURIAM.<sup>1</sup>

From a judgment rendered against defendant in justice's court, he appealed on questions of law alone. The justice, in his return to the district court, certified to a full and correct transcript "of all of the evidence given upon the trial." It is obvious from the return that the evidence, as certified up, was wholly inadequate to warrant the rendition of a judgment in plaintiff's favor in any amount; and the district court so held,—reversing the judgment. Counsel for plaintiff readily concedes that, if we are to consider the return as containing all of the evidence, the district court could not do otherwise than reverse. But his contention is that from the whole record it is evident that a part of the evidence was omitted. We cannot agree with him. And if it was the fact, as he claims, an amended return should have been obtained prior to the hearing in district court.

Judgment affirmed, but no statutory costs will be taxed.

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MERCHANTS NATIONAL BANK OF GRAND FORKS v. GEORGE  
BARLOW and Others.

April 18, 1900.

Nos. 11,864—(4).

**Objections to Evidence—Pleading.**

Objections to evidence offered must be so specific that the court may intelligently rule upon them, and the opposite party may, if the case admits of it, remove them by amendment or otherwise. Hence a general objection that the evidence is incompetent, irrelevant, and immaterial is not specific enough, where the real objection relates to the sufficiency of the pleadings.

<sup>1</sup> LOVELY, J., took no part herein.

**Failure to Reply—Waiver—Appeal.**

If a reply be necessary in a cause, but none is made, yet, if the cause is tried, without objection on that ground, as if the allegations of the answer were in issue, the want of a reply cannot be raised for the first time in the appellate court.

Action in the municipal court of East Grand Forks to recover \$300 for conversion. The court, Sullivan, J., found in favor of plaintiff for \$210.05, and from a judgment entered pursuant thereto defendants appealed to the district court for Polk county. From a judgment of the district court, entered pursuant to the order of Ives, J., and reversing the judgment of the municipal court, plaintiff appealed. Reversed.

*A. A. Miller and Tracy R. Bangs*, for appellant.

*Grover & Massee*, for respondents.

START, C. J.

This action originated in the municipal court of East Grand Forks. The complaint alleged that on December 11, 1897, John and Angeline Rea, the then owners of certain wheat, duly executed to the plaintiff a chattel mortgage thereon, with other property, to secure the payment of \$3,052.92, which was duly filed December 17, 1897; that thereafter, and on December 29, 1897, the defendant Barlow, as constable, at the direction of defendant H. B. Laughlin, and by virtue of a pretended writ of attachment, seized and levied upon the wheat; that the plaintiff duly demanded the return thereof, whereupon the defendants Laughlin, Larson, and Rosaaen executed an indemnity bond, as provided by statute, to the defendant Barlow, who refused to deliver the wheat, but converted it to his own use. The answer contained a general denial, and alleged as a justification for seizing the wheat a levy thereon by virtue of an execution issued on a judgment against John Rea in favor of Laughlin upon a demand antedating the plaintiff's mortgage in an action commenced after the mortgage was filed. The further here material allegations of the answer were these:

"Defendants deny that plaintiff had any valid mortgage on the property taken by this defendant, and that any mortgage that he had was void as to creditors, and especially as to these defendants and the judgment creditor, H. B. Laughlin, on which said execution

was issued. \* \* \* That the mortgage described in said complaint authorized the said John Rea to sell said mortgaged property without applying the proceeds of the sale thereof to the payment of said debt secured by said mortgage. That said John Rea continued to sell said grain and property up to the time of the levy under said execution, and during all that time sold said property covered by said mortgage, with the knowledge and consent of this plaintiff, and without applying the proceeds of such sales towards the payment of said mortgage debt; that said mortgage was in fraud of creditors, and void, and especially as to these defendants and the judgment creditor, H. B. Laughlin."

There was no reply. On the trial the plaintiff introduced its chattel mortgage, with other evidence, tending to establish prima facie its cause of action. This evidence was objected to by the defendants on the sole ground that it was incompetent, irrelevant, and immaterial. The objection was overruled, and the evidence received, to which ruling the defendants excepted. The defendants offered no evidence, and the municipal court rendered judgment for the plaintiff, from which the defendants appealed to the district court of the county of Polk on questions of law alone. The district court rendered judgment for the defendants reversing the judgment of the municipal court, and the plaintiff appealed from the judgment to this court.

Unless it was reversible error for the municipal court to receive the plaintiff's evidence over the defendants' objection, the judgment of the district court must be reversed, for the evidence was sufficient to sustain the judgment of the trial court. The defendants claim that by failing to reply the plaintiff admitted the new matter alleged in the answer; hence they were entitled to judgment on the pleadings. The plaintiff, on the other hand, claims that no reply was necessary, for the reason that the allegations of the answer did not constitute new matter, but were mere conclusions of law, which were not admitted by a failure to reply; and, further, that, if a reply were necessary, the cause was tried as if the allegations of the answer were in issue, and the want of a reply cannot be raised for the first time in the appellate court. The record does not show that any motion for judgment for the defendants for want of a reply was made in the trial court, or any objection made to the admission of evidence on the specific ground that the allega-

tions of the answer were admitted by a failure to reply. It is substantially admitted that the question was raised for the first time in the appellate court, unless the defendants' objections that the evidence was incompetent, irrelevant, and immaterial were sufficient to raise the question. We hold that they were not.

Objections to evidence offered must be so specific that the court may intelligently rule upon them, and the opposite party may, if the case admits of it, remove them by amendment or otherwise; hence a general objection that the evidence is incompetent, irrelevant, and immaterial is not specific enough, where the real objection relates to the sufficiency of the pleadings. *Vaughan v. McCarthy*, 63 Minn. 221, 65 N. W. 249; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147. The mortgage and other evidence in this case were competent, material, and relevant to prove the allegations of the complaint which were in issue under the general denial in the answer. No objection on the ground of failure to reply having been made in the trial court, and the case tried as if the allegations of the answer were in issue, the objection cannot be raised for the first time in the appellate court, and the defendants must be held to have waived a reply, if one was necessary.

This necessarily leads to the conclusion that the judgment of the district court must be reversed, and it is not necessary to decide the further question whether the allegations of the answer as to the fraudulent character of the mortgage were mere conclusions of law, which did not constitute new matter requiring a reply for the reason that they did not comply with the rule that, when fraud is intended to be set up in a pleading, a general charge of fraud is insufficient, but the facts constituting the fraud must be stated.

Ordered, that the judgment of the district court be reversed, and the cause remanded, with directions to the district court to enter judgment affirming that of the municipal court.



## OLE PERSON v. THOMAS BOWE.

April 18, 1900.

Nos. 11,951—(31).

**Wages.**

Action for wages as a farm laborer, in which it is *held*:

**Findings Sustained by Evidence.**

1. That the findings of the trial court, to the effect that the contract was for seven months' service only, and that the plaintiff performed the contract on his part, are sustained by the evidence.

**Evidence.**

2. That certain evidence was not within the rule that an offer to compromise a disputed matter is not admissible against the party making the offer, and that the court did not err in receiving the evidence.

Action in the municipal court of Mankato to recover \$119 and interest for wages. The case was tried before Shissler, J., who found in favor of plaintiff for \$109 and interest. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*W. R. Geddes*, for appellant.

*W. E. Young*, for respondent.

**START, C. J.**

Action for wages as a farm laborer. The complaint alleged that the plaintiff worked for the defendant seven months for the agreed price of \$17 per month, and that no part of his wages had been paid, except \$10. The answer alleged that the plaintiff agreed to work for the full term of eight months, for \$16 per month for the first four months of the term, and at \$18 per month for the last four months thereof; that the services mentioned in the complaint were performed pursuant to such special contract, and that after working seven months the plaintiff abandoned the contract without the consent of the defendant; and, further, that the plaintiff had been paid on such contract \$15. The trial court found, in effect, that the allegations of the complaint were true, and ordered judgment for the plaintiff for \$109. The defendant appealed from an order denying his motion for a new trial.

1. The first alleged error is that the findings of the court are not sustained by the evidence. The principal issue was whether the contract was for seven months' service, or eight months'. It may be conceded that the preponderance of the evidence on this issue was in favor of the defendant, but it was not conclusive. The finding is fairly supported by the evidence.

2. Evidence on behalf of the plaintiff was received by the court, over the defendant's objections, to the effect that when the plaintiff demanded his pay for his services the defendant said that he could not then pay, but would let the plaintiff have \$20, and would pay the rest about the middle of November; that, if the plaintiff "would throw off five dollars," he would at once pay the claim. It is here urged that this was reversible error, for the reason that it violated the rule that an offer to compromise a disputed matter is not admissible in evidence against the party making the offer. The evidence objected to was not within this rule; for it did not relate to any matter then in dispute between the parties, or to any attempt to compromise a disputed claim. On the contrary, it was an offer of present payment of a then undisputed claim, if the proposed discount was allowed. The evidence was competent and relevant upon the issue whether the contract was for seven months' service, as claimed by the plaintiff. It tended to show an indirect admission on the part of the defendant that the plaintiff had performed his contract; for, if true, no claim was made to the contrary by the defendant when the demand for payment was made.

Order affirmed

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A. HIRSCHMAN COMPANY v. JACOB KIEWEL

April 18, 1900.

Nos. 11,985—(48).

**Action for Price—Charge to Jury—Evidence.**

In an action for goods sold, *held*, (1) that the trial court did not err in instructing the jury, in effect, that evidence of the correspondence and acts of the parties after the alleged sale of the goods could only be con-

sidered for the purpose of determining what the original contract was:  
(2) that the verdict is sustained by the evidence.

Action in the district court for Morrison county to recover a balance alleged to be due for goods sold. The case was tried before Baxter, J., and a jury, which rendered a verdict in favor of defendant. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

*Lindbergh & Blanchard* and *Charles Bechhoefer*, for appellant.

*Frank W. Lyon*, for respondent.

START, C. J.

Action for goods sold. The complaint alleged that at St. Paul, on January 31, 1898, the plaintiff, at the request of the defendant, sold to him goods of the agreed value of \$942.50, no part of which had been paid, except the sum of \$501.87. The answer was a general denial. Verdict for the defendant, and the plaintiff appealed from an order denying its motion for a new trial.

The record presents two questions for our decision. One is whether the verdict is sustained by the evidence; the other, whether the trial court erred in its charge to the jury as to certain documentary evidence.

On the trial the plaintiff's president testified that he sold the goods to the defendant at St. Paul, stating the time. This the defendant denied, and he and another witness, Rudolph Blum, testified that the goods were sold at St. Paul at the time stated, not to the defendant, but to Blum. The evidence shows that the defendant was a brewer, having his place of business at Little Falls, and that Blum was about to start a saloon at Sauk Center, and that the defendant was to buy the fixtures for the saloon and furnish money for the license. The goods, consisting of a stock of liquors, were billed to the defendant, and shipped in his name, to him to Sauk Center, by the plaintiff, without the previous knowledge of the defendant. The station agent, after the arrival of the goods, and on February 7, 1898, caused to be sent or presented to the defendant a written notice in these words: "We have some goods here billed to Jacob Kiewel. Notify Rudolph Blum. Please wire order from

Kiewel to deliver to Blum." The defendant signed an order on the back of the notice, which was in these words: "Mistake in billing. Turn goods over to Blum." The goods were accordingly turned over to Blum. Certain letters from the defendant with reference to the goods were also introduced. One of them, dated February 3, was to the effect that the shipping of the goods in the defendant's name was a mistake,

"As I do not want my name made known. The license is in his name, and the goods ought to have been shipped the same. Please telegraph to the agent at Sauk Center at once, and have the goods turned over to Blum, and say it was a mistake in billing."

It does not appear that the plaintiff took any action with reference to this request, but the defendant testified that the president of the plaintiff called on him on February 7, and told him that the shipping of the goods in his name was a mistake. The witness Blum also testified to a similar admission at another time. On February 9, the defendant wrote to the plaintiff to the effect that the goods were shipped in his name by mistake; that they were to be shipped to Blum, and remain the property of the plaintiff until they were sold.

"I do not accept the goods as charged to me, and have told Blum not to start until it is straightened out."

The president of the plaintiff wrote in reply to the effect that the contents of the defendant's letter were a surprise to him, as his understanding was that the matter had been settled to the satisfaction of all parties; that no business man would furnish Mr. Blum goods on his own credit without a guaranty from the real owner of the business.

"As you are the real owner of the place, and control the business, we naturally expect some guaranty from you. This [is] fair and square, and we are not trying to burden you with any more responsibility than you should carry. In case the venture should not prove to be a success, \* \* \* we are to take back whatever remains unsold of our goods at invoice price, and we shall certainly live up to it."

There was other evidence, both oral and documentary, bearing

more or less directly upon the question whether or not the goods were in fact sold to the defendant or to Blum. The plaintiff excepted to the following instruction:

"There is a good deal of testimony as to what occurred after the making of this agreement in St. Paul, but that is only corroborative of what took place between the parties in St. Paul. It is not claimed that any new agreement was entered into afterwards, but they claim the agreement was made there, and all these letters and statements, and everything that has been introduced in evidence, is to show what that bargain in St. Paul was, and you will not consider it for any other purpose."

The plaintiff claims that the defendant, by his order to the station agent to deliver the goods to Blum, thereby accepted them as his own, whether he had previously purchased them or not; hence the evidence is conclusive that the verdict should have been for the plaintiff, and not for the defendant.

But, if mistaken in this, it is further claimed that it was a question for the jury to determine, from the letters and conduct of the parties after the goods were shipped, whether there was a sale of the goods to the defendant independently of what took place at St. Paul; hence the court erred in giving the instruction. It is true, as the plaintiff claims, that if goods are shipped to and received by a party, though not ordered by him, he will in law be regarded as a purchaser thereof, if he exercises acts of ownership over them which are inconsistent with the ownership of another. But such is not this case; for it is apparent, from the correspondence of the parties and upon the face of the order to the station agent to deliver the goods to Blum, that the order was not made as an act of ownership of the goods inconsistent with the rights of the actual owner, but for the purpose of correcting what the defendant understood to be a mistake. He did not, as a matter of law, make the goods his own by his acts after the goods were shipped. The evidence, oral and documentary, as to what occurred after the goods were shipped, was competent for the purpose of corroborating the plaintiff's claim that defendant purchased the goods at St. Paul before they were shipped. It would not justify a finding that the defendant purchased the goods after they were shipped. Therefore the court did not err in giving the instruction excepted to.

Whether the defendant purchased the goods was, under the evidence, a question of fact for the jury, and the verdict in favor of the defendant on this issue is reasonably sustained by the evidence.

Order affirmed.

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CHARLES J. LYFORD v. JOHN A. MARTIN.

April 18, 1900.

Nos. 11,986—(119).

**Action for Services.**

Action to recover for services as a veterinary surgeon, in which it is held:

**Licensed Veterinary Surgeon—Pleading and Proof.**

That it was not necessary for the plaintiff to allege and prove that he was licensed as a veterinary surgeon; and, further, that the judgment of the justice court in his favor is sustained by the evidence.

**Counterclaim—Failure to Reply.**

That the defendant was not entitled to judgment on his alleged counterclaim for want of a reply, the question having been raised for the first time on appeal.

Appeal by defendant from a judgment of the district court for Hennepin county, entered pursuant to the order of McGee, J., and affirming a judgment of a justice of the peace in favor of plaintiff. Affirmed.

*Penney & McMillan*, for appellant.

*Smith & Smith*, for respondent.

START, C. J.

The plaintiff brought this action in a justice court, and alleged in his complaint that he was a licensed veterinary surgeon, and that he performed services, at the agreed price of \$25, for the defendant, in doctoring his horse, no part of which had been paid, except \$15. The answer contained a general denial, and alleged that the parties entered into a contract whereby the plaintiff agreed to cure the horse for \$25, which sum the defendant agreed to pay him

if he cured the horse, but that he failed to effect such cure. And, as a proposed counterclaim, the answer further alleged a breach of the contract, in that, by reason of the failure of the plaintiff to perform it on his part, the defendant was obliged to employ another veterinary surgeon to cure the horse, and pay him for his services \$15. There was no reply. Judgment for the plaintiff for \$10, from which the defendant appealed to the district court of the county of Hennepin on questions of law alone. Judgment was entered in the district court affirming that of the justice court, and the defendant appealed from the judgment to this court.

1. The defendant's first contention is that there was no evidence to sustain the judgment of the justice court, in that there was no evidence that the plaintiff was a licensed veterinary surgeon. The only evidence on this point was the testimony of the plaintiff, which was received without objection, to the effect that he was a veterinary surgeon, and had been since 1875. If it was necessary for the plaintiff, as a condition precedent to his right to recover for his services, to allege and prove that he was a licensed veterinary surgeon, this evidence must be held to be sufficient; the question having been raised for the first time after judgment. A veterinary surgeon is a person lawfully practicing the art of treating and healing injuries and diseases of domestic animals. A person cannot lawfully practice such art in this state without a license. G. S. 1894, § 7948. Hence the evidence in this case that the plaintiff was a veterinary surgeon implies, *prima facie*, that he was licensed as such. As there were no objections to this evidence, no question as to its competency can be considered. But the plaintiff was not bound to allege and prove, as a condition precedent to his right to recover, that he was a licensed veterinary surgeon, for noncompliance with the law was a matter of defense. *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207.

It is further urged that there was no evidence that the plaintiff cured the horse in question. What the contract between the parties was, and whether it was performed by the plaintiff, was, under the evidence, a question of fact for the justice court, and its judgment in this respect is sustained by the evidence.

2. The defendant's last claim is that the justice court erred in not awarding him judgment on his alleged counterclaim, for the reason that it was admitted by a failure to reply to it. The alleged special contract to cure the horse, and a breach thereof, which is made the basis of the supposed counterclaim, was properly pleaded as a defense. This defense was not admitted by a failure to reply. *Walker v. McDonald*, 5 Minn. 368 (455); *Ward v. Anderberg*, 36 Minn. 300, 30 N. W. 890. This issue as to the special contract and its breach was litigated by the parties without objection by either, and by its judgment in favor of the plaintiff the justice court necessarily found either that the special contract was never made, or that there was no breach thereof. If the contract was not made, or there was no breach of it, there was no basis for the counterclaim. It necessarily follows that the subject-matter of the alleged counterclaim was litigated by consent, and that the defendant cannot urge for the first time on appeal the objection that the alleged counterclaim was admitted. *Taylor v. Parker*, 17 Minn. 447 (469); *Matthews v. Torinus*, 22 Minn. 132. It is therefore unnecessary to decide whether the facts alleged in the answer constitute a counterclaim proper, which was admitted by a failure to reply, or a defense by way of recoupment. See *Harlan v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 427, 18 N. W. 147.

Judgment affirmed.

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CONRAD WEISEL v. EASTERN RAILWAY COMPANY OF MINNESOTA.

April 19, 1900.

Nos. 11,754—(34).

**Railway—Injury to Employee—Proximate Cause.**

Plaintiff, a common laborer, in the line of his duty was at work for defendant putting a hose upon the tender of an engine, which was loaded with coal, and standing still. At the same time another servant was standing upon the loose coal on the tender to receive the hose from his fellow servant on the ground, when a lump of coal was dislodged from the tender, and fell upon and injured the plaintiff. *Held*, upon a claim that defendant was negligent in overloading the engine with coal, and

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thereby responsible for plaintiff's injury, that its acts in this respect were not the proximate cause of the accident, and did not constitute actionable negligence for which a recovery can be had.

**Dangers of Occupation—Negligence of Fellow Servant.**

Under the facts in this case the dangers to which plaintiff was subjected when he was injured were not peculiarly and distinctively railroad hazards, and the injuries caused by the negligence of his fellow servants would not entitle him to recover therefor from his employer.

Action in the district court for Carlton county to recover \$2,000 for personal injuries. The case was tried before Cant, J., and a jury, which rendered a verdict in favor of plaintiff for \$500. From an order denying a motion for a new trial, defendant appealed. Reversed.

*J. A. Murphy*, for appellant.

*Windom & McMahon* and *O'Brien & Vaughn*, for respondent.

**LOVELY, J.**

This action is for injuries received by plaintiff while at work as a common laborer in and about defendant's gravel pit on its railroad near Nickerson, in this state. He had a verdict. Defendant moved for a new trial upon a settled case. The motion was denied by the trial court, from which order defendant appeals, and brings the whole record into this court for review.

The plaintiff was one of a crew of men attending upon a steam shovel in the gravel pit, which was being operated with the customary equipments for loading and hauling gravel from the pit to the main line of defendant's road. At the time when plaintiff was injured he had been at work four or five days performing such ordinary and common duties of his employment as were required, among which was the aid he was required to give in the task of transmitting water from a locomotive (brought into the pit for that purpose) to the steam shovel, in which particular service he received his injuries. The steam shovel had to take the water it used from a locomotive, there being no other means of supply at the pit, and the locomotive furnishing it would run into the pit near the shovel, a hose would be attached to the locomotive, and from thence conducted to the boiler of the steam shovel, and, with

the aid of a siphon attachment, when this connection was made the requisite amount of water would, under steam pressure, be forced from the locomotive to the shovel. In pursuance of the usual custom at the time in question, the locomotive, with its tender loaded with coal, came into the pit to supply the shovel, and stopped on the track, where it remained stationary until after the injury. It then became the duty of plaintiff, with the assistance of another laborer, to take up the hose with the siphon attached, and hand it to another employee, one William Dunn, who at this time stood on the loose coal upon the tender. In lifting the hose from the ground to Dunn, and at the moment when it was being handed up to the latter, a piece of coal was dislodged from the tender, and fell upon the plaintiff, knocking out two of his teeth and loosening two others.

It is for this injury inflicted in this manner that the verdict was recovered, and the contention for plaintiff in support of the verdict is: (1) That by the negligence of defendant in overloading the tender the plaintiff sustained his injury; (2) that the acts of other servants in dislodging the coal, if contributing to or occasioning his injury, were acts within the remedy of the fellow servant law of this state (Laws 1887, c. 13; G. S. 1894, § 2701).

Unless the dislodgment and fall of the coal upon plaintiff was caused either by the acts of Dunn alone or in connection with the movements of plaintiff and his fellow laborer on the ground, it is not obvious what could have been the immediate or direct force that caused the accident, even though the tender was overloaded, for there was no vibration or movement of the tender at the time, or, apart from the movements of these servants, any agency that could or did dislodge and precipitate the coal from the tender to the ground; and if it be insisted as an explanation of the accident that the tender was so overloaded that the coal would fall upon plaintiff without any independent influence operating upon it, the danger would be so open and apparent that in performing his duties under the circumstances as disclosed in this case plaintiff would have clearly assumed the risk of injury, and could not recover therefor. But, if we go further, and connect the movements of the employee Dunn, who was on the

engine, with the displacement of the piece of coal which fell upon plaintiff,—and from the evidence and statements of plaintiff himself it is clear that such must have been, to some extent, the efficient and immediate cause of the injury,—we are not able to sustain the verdict upon the ground that the engine tender had been negligently overloaded.

It had in fact been loaded, and had run a considerable distance on the road before the accident, and at the time when plaintiff was hurt was standing perfectly still on defendant's track, openly visible to the most casual observer; and the lump of coal had not then fallen, and it seems certain, beyond any doubt, would not have fallen if it had not been directly affected by the movements of Dunn, either alone or in connection with the acts of plaintiff or of his fellow servant, who was assisting him on the ground. In either case the defendant ought not to be required to anticipate that so unusual and peculiar a combination of circumstances would occur as to occasion so extraordinary and unexpected an accident from such a commonplace and ordinarily simple cause; or, in other words, we cannot hold that the overloading of the tender, if it was supplied with an unusual quantity of coal, was the proximate cause of plaintiff's injury, but that, notwithstanding the fact that the coal was piled loosely upon the tender, as is usual, the results that happened were brought about by a new and independent cause,—the acts of plaintiff's fellow servants,—for which defendant would not be responsible unless held for this negligence under the provisions of the co-employee's act, and not upon the common-law rule applicable in such a case.

We are also clearly of the opinion that under the fellow-servant act, above referred to, as interpreted by the previous decisions of this court, plaintiff could not recover for the negligent acts of the fellow servants who were with him at the time of his injury. It is true, the coal was in the tender of the locomotive, which was, in its usual use, propelled by steam power on the defendant's railroad; but it was at the time of the accident standing perfectly still, and the danger of its contents being dislodged and falling was no other, different, or greater in any respect than would exist from a stationary coal bin not connected with the railroad. In this respect,

and by this test, as repeatedly made by this court, the risk to which plaintiff was subjected was not a railroad hazard, nor within the protection of the statute. *Lavallee v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222, 45 N. W. 156; *Pearson v. Chicago, M. & St. P. Ry. Co.*, 47 Minn. 9, 49 N. W. 302.

Order reversed, and a new trial awarded.

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E. H. EIDAM v. GUST JOHNSON.

April 19, 1900.

Nos. 11,905—(98).

**Appeal from Justice Court—Bond—Laws 1897, c. 46.**

Under Laws 1897, c. 46, the district court, on an application to affirm a justice's judgment for failure to furnish sureties, may afford the appellant a reasonable opportunity to furnish a new bond, if necessary, before cutting off his right to be heard on appeal, by affirmance of such judgment.

**New Surety on New Bond.**

Where a new surety justifies under the terms of such statute on a justice's appeal bond, with the acquiescence of a previous co-surety, and these two sureties, although their obligations are expressed in two instruments, are accepted at different times by different judges of the same district bench, it is error to affirm the judgment of the justice for a failure to furnish a proper bond.

Appeal by defendant from a judgment of the district court for Hennepin county, entered pursuant to the order of Brooks, J., and affirming a judgment of a justice of the peace in favor of plaintiff. Reversed.

*G. A. Petri*, for appellant.

*Simon Michelet*, for respondent.

LOVELY, J.

Plaintiff recovered a judgment before a justice of the peace in Hennepin county. The defendant appealed to the district court, giving a bond in proper form, with two sureties, duly approved by the justice. Plaintiff excepted to the sureties, under Laws

1897, c. 46, whereupon the defendant appeared before Judge Harrison, of the Hennepin bench, upon due notice, with the sureties, one of whom (Franz Pearson) qualified and was accepted by the court. The other surety did not qualify, was rejected, and a continuance for two days was allowed by the court to afford defendant an opportunity to obtain another surety. On the afternoon of the second day following, defendant, with one Emil Strand, as a new surety, went to the court house in Minneapolis, and, not finding Judge Harrison, appeared with Strand (who was offered in place of the rejected surety, Weberg) before Judge Pond, of the same bench. Judge Pond, after a hearing, found that Strand was a suitable surety, approved a bond signed by him, in form the same as the bond approved by the justice on the appeal, with this additional provision: "That this instrument shall be, and the same hereby is, considered as a part of the bond heretofore filed herein," etc.

Afterwards plaintiff moved in the district court for judgment of affirmance under the provisions of chapter 46, § 4, heretofore referred to, pending which Franz Pearson, the surety on the bond who had been accepted by Judge Harrison, acknowledged his satisfaction to the substitution of Strand for the rejected surety, Weberg. All of these facts were before the court on the proceeding to affirm under the statute. Upon the hearing of such motion the court below directed that judgment be entered in favor of plaintiff for the amount of the judgment in justice's court and costs, which order was appealed, and, in our view, should be reversed.

While Laws 1897, c. 46, under which the order was affirmed, provides for the proceeding adopted by plaintiff in such exception to the sureties, and also that, if the sureties fail to justify, the judgment of the justice shall be affirmed, yet this law must be reasonably construed in connection with other statutes relating to the subject, and in view of the real purpose sought to be accomplished by it, which is to secure the successful suitor in the justice's court with security for his judgment on the appeal. When this statute was enacted it was also a provision of the law relating to appeals from justice's court that no appeal should be dismissed for want of a proper bond, providing the party appealing cured the defect by

new sureties, or even by a new bond, before a motion to dismiss should be determined. G. S. 1894, § 5076; *Mills v. Wilson*, 59 Minn. 107, 60 N. W. 1083. The district court evidently thought it had no power to give this relief, but applied to the situation too strict a construction of the statute; following it literally, no doubt, but, as we view it, excluding its relation to the other statutes upon the subject, and not sufficiently considering the real purpose for which it was enacted. We conclude that errors, defects, or even a want of a proper bond, on an appeal from a justice's judgment, are not jurisdictional, but that the statute providing for an affirmance if the sureties fail to justify still leaves—for the purpose of securing a proper bond—power in the district court to permit the substitution of a new bond before the matter is finally disposed of by an order to affirm where there is an excusable failure to comply with the directions of the court to provide sufficient sureties.

In this case the original bond, with the surety, Pearson, who had been accepted, and the subsequent instrument (a bond, in form, adopting all the provisions and liabilities of the original obligation, and tendered to the court before the motion to affirm was heard, with the acceptance of the new surety by Pearson), in connection with the fact that the appellant was actively doing his best at the time to furnish a satisfactory bond in obedience to the order of the district court, was a sufficient compliance with the terms of the statute providing for the giving of new sureties, since the two instruments, when read together, constituted, under the circumstances of the case, a good obligation, holding both Pearson and Strand. We are of the opinion the judgment of the justice should not have been affirmed by the district court.

Judgment reversed, and case remanded for further proceedings.

**B. E. INGWALDSON v. NILS OLSON and Others.**

April 19, 1900.

Nos. 12,012—(102).

**Judgment against Those not Parties to Action—G. S. 1894, § 5436.**

It is not permissible to bind new parties by a judgment previously entered against other defendants in a former proceeding, under G. S. 1894, § 5436, unless they were originally named as parties to the action in which the judgment was entered; such provision being applicable only to cases where parties jointly liable, and subsequently proceeded against, were named as defendants in the original suit.

**Same—Entry of Judgment by Clerk.**

Neither can the clerk of the district court enter a judgment against parties sought to be held under such statute, upon default, or without authority expressly conferred by the district court.

Appeal by plaintiff from an order of the district court for Clay county, Baxter, J., granting a motion to set aside a judgment against defendants Mary Olson and Mathea Olson. **Affirmed.**

*B. E. Ingwaldson and N. I. Johnson*, for appellants.

*Greeley E. Carr*, for respondents.

LOVELY, J.

This action was originally brought against Nils and Andrew Olson to recover for laborer's wages incurred by defendants. The summons was served, no answer was interposed, and a default judgment for the amount claimed was duly entered in favor of plaintiff, who afterwards discovered that the appellants, Mary and Mathea Olson, were jointly indebted with the judgment debtors for the labor services which constitute the claim against Nils and Andrew Olson above referred to. The plaintiff then attempted to secure the benefit of the statute (G. S. 1894, § 5436) which provides that

“When a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by proceeding as provided by statute, those who were not originally summoned to answer the complaint may be summoned to show cause why they

should not be bound by the judgment, in the same manner as if they had been originally summoned."

To secure this purpose, plaintiff caused a second summons against the two new defendants to be served upon appellants. They also defaulted, and, upon an affidavit tending to show a joint liability of these latter with the original defendants, the district clerk, without authority from the court in which the suit was pending having been expressly given, entered judgment against such additional parties for the same amount as in the previous judgment. After the entry of the last judgment, Mary and Mathea Olson duly moved the court to vacate and set it aside, which motion, after hearing, was granted; and this order, upon plaintiff's appeal, is now before this court for review.

We think the order appealed from should be affirmed, for two reasons:

1. The provisions of G. S. 1894, § 5436, which is the only authority for the attempted effort in this case to bind new defendants by the previous judgment, undoubtedly refer to such proceedings under the statute (G. S. 1894, § 5207), where some, but not all, of the defendants named in the original action have been served, and likewise where, under the terms of that law, the judgment entered is "against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served." *Johnson v. Lough*, 22 Minn. 203. In this case Mary and Mathea Olson were not parties to the original suit, and section 5436, above referred to, does not, for that reason, authorize the court to bind them in the same manner as if they had been originally summoned.

2. It appears that these parties who were secondarily sought to be held in this case were never cited before the court on an order to show cause why the judgment as originally entered should not be made binding upon them, but, upon a summons issued by the plaintiff, the clerk of the district court entered the judgment as by default. Clearly, the judgment holding the respondents as original defendants could only, by the clear terms of the statute itself, be rendered upon a hearing and determination of the district



court, in which, upon evidence, and a proper consideration of the grounds therefor, it could be held, in a proper case, that the defendants not personally served in the original action should be bound by the judgment therein in the same manner as if they had been originally summoned.

Order affirmed.

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GEORGE P. SMITH v. ST. PAUL CITY RAILWAY COMPANY.

April 19, 1900.

Nos. 12,067—(161).

**Dogs.**

Dogs are personal property in this state, and an action will lie in favor of the owner of a dog, having a substantial money value, for its destruction through the negligence of a third party.

**Municipal Ordinances.**

A municipal ordinance authorizing a police officer to destroy a dog which is unlicensed, or not wearing a collar or muzzle as required thereby, does not authorize a third party to kill such animal, or relieve him from damages for negligently destroying the same.

**Street Railway—Verdict Sustained by Evidence.**

Facts in this case considered, and held that the evidence supports the verdict of the jury, and their finding that the collision between defendant's street car and a valuable dog was actionable negligence, for which the owner of the dog might recover its value from the defendant.

Action in the district court for Ramsey county to recover \$250 damages for killing plaintiff's dog. The case was tried before Kelly, J., and a jury, which rendered a verdict in favor of plaintiff for \$50. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Munn & Thygeson*, for appellant.

*McDonald & Kelly*, for respondent.

LOVELY, J.

Action against defendant for negligently running one of its street cars in the city of St. Paul upon, and thereby killing, a valu-

able dog belonging to plaintiff, who had a verdict. A motion for judgment (or, if denied, for a new trial) was overruled, from which order this appeal brings the record, with the evidence, into this court for review.

The defendant contends that there was no evidence of negligence on the part of the street-car company in running its car upon the dog, and that the court below erred in excluding an ordinance providing that dogs in the city of St. Paul must be licensed, and that a dog may be destroyed by an officer if not so licensed, or muzzled or wearing a collar in evidence of such license.

Accepting (as we are bound to do) in favor of the verdict every reasonable inference which may be drawn from the evidence in its support, we must hold upon the first contention that plaintiff owned the dog that was killed; that it was highly bred, large in size, and of substantial money value; also, that on the day of the accident, in the absence of the owner from home, his wife had a number of dogs (among them the one killed), for exhibition to third parties, in the yard of the family residence, which adjoined Grand avenue, one of the streets of the city upon which defendant's tracks were laid, and over which its cars were operated. The dogs escaped from the yard and control of plaintiff's wife, and went to the opposite side of the street, followed by plaintiff's child, who continued with them up to and at the time of the accident. It seems that plaintiff's wife became very much excited, and did her utmost to recall the dogs and child to the yard, for fear that they would be injured by one of defendant's cars, which was approaching something more than a block distant. The dogs and child started to return to the yard, and on their way back all got safely across the street-car tracks, except the animal in question, which was struck and killed by the approaching car. This car was one of the usual passenger cars on defendant's line, operated by a motoneer, who could and did, upon his own admission, discover the danger of a collision in sufficient time to stop the car, notwithstanding which, as plaintiff's evidence tended to show, he ran the same at a dangerous rate of speed, estimated by plaintiff's witnesses to be over twenty miles an hour, and ten miles faster than was authorized by the city ordinance, until he struck and killed

the dog; nor did he then stop, but continued on his way, without giving the accident further notice.

That such conduct on the part of the defendant's servant operating its car was negligence, does not seem to admit of doubt; and it was a question for the jury whether, under all the circumstances of the case, the dog would have escaped if the car had been run at a legal and proper rate of speed, or, in other words, whether the negligence of defendant was the proximate cause of the loss of the dog, for which damages were awarded. The verdict of the jury disposes of this question, and it should not be disturbed.

We do not think it was error for the trial court to exclude the ordinance requiring dogs to be licensed, and authorizing the police officers of the city to destroy them when found running at large, if not licensed, or wearing muzzles or collars. If the city had the right to adopt such measure as a police regulation, it had no right to authorize defendant's reckless conduct, or justify a canine proscription, wherein general acts of negligence and recklessness by third parties would be licensed or exonerated. In this state, dogs are made personal property by statute (G. S. 1894, § 6904), and are taxed as such; and this particular dog had, under the evidence, a peculiar value, equal to the verdict recovered. The evidence also shows that the dog in question was ordinarily kept in the home of the plaintiff, and not allowed to run at large, but had escaped, and was being reclaimed, at the time of the accident. Under such circumstances, the ordinance would have no application to the facts in this case.

We do not hold that a street-car company must stop its cars, when running at a legal or reasonable rate of speed, to avoid collisions with dogs. Ordinarily dogs may be presumed to take care of themselves, and the motoneer may act on such presumption. We place this decision upon the ground that it was for the jury to say whether the dog could have escaped if the car had been running at a proper rate of speed. But upon the improper speed of the car from which the collision resulted, as found by the jury in this case, the verdict, determining that there was actionable negligence, should be sustained.

Order affirmed.

## STATE ex rel. JULIA C. MUSGRAVE v. PROBATE COURT OF POLK COUNTY.

April 20, 1900.

Nos. 11,816—(5).

**Claim against Estate of Decedent—Application to File.**

Applications in probate court for leave to file claims after the time fixed therefor has expired are addressed to the discretion of that court. *Held*, that the application in this case should have been granted by the probate court, and that the district court was justified in reversing the order denying it.

Writ of certiorari issued from the district court for Polk county to the probate court of that county to review an order made in the matter of the estate of Stephen H. Parkhurst, deceased, and denying the petition of relator for an extension of time in which to present a claim against said estate. In the district court the case was tried before Watts, J., who found in favor of relator, and directed judgment that the order be reversed. From a judgment entered as directed, W. G. Smith, administrator of said estate, appealed. Affirmed.

*Grover & Massee*, for appellant.

*A. A. Miller*, for respondent.

BROWN, J.

This is an appeal from an order of the district court of Polk county reversing an order of the probate court of that county denying the petition and application of respondent for an extension of time in which to present her claim. On July 26, 1897, the last will and testament of S. H. Parkhurst was duly admitted to probate, and on the same day the probate court made an order fixing the time for the presentation of claims at six months from that date. The same order fixed May 5, 1898, as the day for the hearing and consideration of claims. The respondent is a creditor of the estate, and employed E. J. Ormsbee, an attorney residing in the state of Vermont, to prepare and present her claim to the probate court. She resides in the state of New Jersey. She for-

merly resided in the state of Vermont, and said Ormsbee was her legal adviser. She intrusted the entire matter of filing her claim to him. Acting under the impression that he had until May 5, 1898, to file the claim, Ormsbee did not file it within the six months. On May 2, 1898, three days prior to the day set for final hearing on claims, the application to be relieved from her default, and for leave to file the claim, was made to the probate court and denied.

No question is made but that the respondent is a bona fide creditor of the estate. There is no doubt but that she exercised reasonable care in the matter of having her claim presented for allowance in proper time, and no doubt in our minds but that the excuse made by Ormsbee for not presenting the claim in time is fully sufficient to warrant the relief applied for. Courts are very liberal in relieving parties from defaults of this kind, especially when no injury can result to innocent parties. They are not only relieved from their own excusable negligence, but from like negligence of their attorneys, as well. In this case it does not appear that the administration of the estate will be in any way hindered or delayed, and it does not appear that any other person interested in the estate will or can be in any manner prejudiced, by granting the application. Applications of this kind, it is true, are addressed to the discretion of the probate court; but we hold that, under the showing made in this case, the district court was justified in reversing the order of that court. *Baxter v. Chute*, 50 Minn. 164, 52 N. W. 379. It is not important what reason the district judge assigned for making the order. He reached a correct conclusion.

The point is made that the certificate of the judge of probate is insufficient to show that all the evidence was returned to the district court. The writ of certiorari commanded him to return all the evidence and proceedings, and we are of the opinion that the certificate is sufficient to show a compliance therewith.

Order affirmed.

## P. BENETEAU v. JACOB STUBLER.

April 20, 1900.

Nos. 11,977—(95).

**Failure of Landlord to Make Repairs—Damage to Tenant.**

A landlord, under a lease expressly exempting him from any obligation to the tenant to make repairs or improvements upon or about the leased premises during the life of the lease, is not liable to the tenant for damages to his goods occasioned by the leased premises becoming and remaining out of repair.

**Decision Supported by Findings of Court.**

Findings of the trial court examined and considered, and *held* that the conclusions of law are supported by the findings of fact.

Appeal by defendant from a judgment of the municipal court of Duluth in favor of plaintiff for \$50.54, entered pursuant to the findings of Edson, J. Affirmed.

*N. H. Wilson*, for appellant.

*Charles C. Teare*, for respondent.

**BROWN, J.**

This action was brought in the municipal court of the city of Duluth to recover upon defendant's promissory note for the sum of \$40. The note was given in settlement of a balance due plaintiff for the rent of a building theretofore by him leased to defendant. Defendant, by his answer, admits the making and delivery of the note, and sets up a counterclaim for damages for injuries to certain of his goods kept in such leased building, which damage was caused by reason of the alleged failure of plaintiff to repair and put the building in proper condition for occupancy after the same had been partly destroyed by fire. Plaintiff had judgment in the court below, and defendant appeals to this court. There is no settled case, no evidence is returned to this court, and the only question to determine is whether the conclusions of law found by the trial court are sustained or supported by the findings of fact.

The facts found by the trial court, and upon which defendant bases his counterclaim, are, in substance, as follows: At a date

long prior to the giving of the promissory note in suit, defendant leased of plaintiff a certain building owned by him in the city of Duluth. Defendant took possession of the building, and conducted a business therein. Thereafter, and in January, 1897, without the fault of plaintiff or defendant, a large portion of the roof on the building was consumed and destroyed by fire, and the building was rendered unfit for occupancy. By the terms of the lease it was expressly agreed that plaintiff should not be under any obligation to make any alterations, improvements, or repairs of any kind on or about the building. Notwithstanding this express provision, the plaintiff did of his own motion replace and repair the damaged roof, but refused to make any other repairs, because and on the ground that the lease did not require him to do so. Subsequent to the time the roof was so replaced, defendant discovered that other and further repairs were necessary, to prevent water from leaking into the building and damaging his goods, and he demanded of plaintiff that he make such repairs. Notwithstanding the refusal of plaintiff to do so, defendant continued in the possession and occupancy of the building, paying rent as it fell due, and at no time until after the commencement of this action did he make any claim for damages for injuries to his goods by reason of the building being out of repair or otherwise. He made no effort to make the repairs himself, and, from aught that appears from the record, no effort to protect his goods from the water he alleges leaked into the building. Upon these facts, and others not important or necessary to state or set out, the court below rejected defendant's counterclaim, and ordered judgment for plaintiff for the balance due on the note.

We are of the opinion that the court below correctly disposed of the case, and the judgment appealed from will be affirmed. By the terms of the lease, the plaintiff was under no obligation to repair the building, and there could be no liability for his failure to do so. If the building was so out of repair as to render it unfit for occupancy, defendant had the right to make the repairs himself, or vacate the building. He elected to do neither, voluntarily remained in the building, paying rent, without a suggestion or claim that his goods were being damaged by reason of the building be-

ing out of repair, and making no effort himself to repair the same, or prevent the damage to his goods. There are no findings of fact under which defendant can recover. The allegations of the answer to the effect that after the fire the parties entered into a new agreement, by which the plaintiff, in consideration that defendant would continue to occupy the building, agreed to repair the same and put it in proper and suitable condition for occupancy, are found not true by the trial court. If the court had found these allegations to be true, defendant would have had some standing in court, but without them, either admitted or proven, he cannot recover.

Judgment affirmed.

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EMIL JOHANKE v. FERDINAND SCHMIDT.

April 20, 1900.

Nos. 12,023—(58).

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**Work and Labor—Evidence.**

In an action to recover the value of work, labor, and services, it is *held* that the evidence made a proper case for submitting to a jury the question whether plaintiff's services were rendered to defendant gratuitously, as a member of his family, or whether they were rendered upon an agreement for compensation.

**New Trial.**

*Held*, further, that the court below erred in holding, on defendant's motion for a new trial, that there was no evidence to establish a liability on defendant's part for the value of such services, and the order vacating the verdict for that reason is reversed.

Action in the district court for Lac qui Parle county to recover \$1,034.50 for work and labor performed, goods sold, and money paid at defendant's request. The case was tried before Qvale, J., and a jury, which rendered a verdict in favor of plaintiff for \$357.16. From an order granting a motion for a new trial unless plaintiff should remit \$338.16 from the verdict, plaintiff appealed. Reversed.



*T. J. McElligott*, for appellant.

*Aaron B. Kaercher*, for respondent.

BROWN, J.

This action is one to recover for work and labor alleged to have been performed by plaintiff for defendant at his special instance and request, the value of fifty bushels of oats sold to him, and the sum of \$19 for and on account of money paid out for the use and benefit of defendant. Six causes of action are set up in the complaint, the first, fifth, and sixth of which have been abandoned, and a recovery is sought under the second, third, and fourth. The second cause of action is for the work and labor, and the third and fourth are for the other two matters above referred to. The plaintiff had a verdict for the sum of \$357.16. On defendant's motion for a new trial, the court below made an order directing that a new trial be granted unless plaintiff should remit from the verdict all in excess of the sum of \$19; the same being the amount claimed by plaintiff, under the fourth cause of action, as and for money paid for and at the request of defendant. The plaintiff refused so to remit, and appealed from the order.

The court based its order on the ground that there was no evidence in the case to warrant a recovery under the second and third causes of action,—not that the evidence was insufficient to justify the verdict, but that there was no evidence at all to establish a liability on the part of defendant. If the court below was correct in that conclusion, the order appealed from should be affirmed; if not, it must be reversed.

The claim on the part of plaintiff is that from 1895 to 1898 he performed work and labor for defendant, of the reasonable value of \$200 per year, no part of which has ever been paid; that he sold to defendant fifty bushels of oats, and paid out for him the sum of \$19 for fence wire. These two latter items require no special attention. The main controversy in the case is over the question whether plaintiff is entitled to recover for the work and labor. That he performed work for defendant is not controverted. It is a well-settled rule that, where one person performs labor for another, the law, in the absence of proof of a contract, and in the ab-

sence of a showing that the same was performed gratuitously, implies or presumes a request to perform the work, and a promise to pay therefor. To overcome this presumption, the defendant contends that during the time in question plaintiff was a member of his family, and performed the work gratuitously, and without agreement or expectation that he would be compensated.

The plaintiff resided with defendant and worked for him on his farm from 1893 to 1895, and was fully paid therefor. In March, 1895, he married defendant's daughter, and in May of that year removed from defendant's home farm to another one owned by him, some three miles away, and thereafter continued to reside thereon and work and farm the same until 1898, when his wife secured a divorce from him. The plaintiff improved the farm so occupied by him and his wife, made repairs on the dwelling house thereon, and raised annual crops, which in the main were taken and appropriated by the defendant. No definite arrangement seems to have been made by the parties as to the compensation of plaintiff. He received nothing of consequence from defendant during such three years, over and above his living. Defendant received the benefit of about all the crops raised by plaintiff, but turned over about \$400 to plaintiff's wife. Although the family relation existed between the parties, they did not reside in the same household, but separate and apart from each other. The defendant worked and carried on his own farm, and the plaintiff worked and improved the farm to which he removed after his marriage.

It is claimed by plaintiff that the work so performed by him was performed under an agreement with defendant that in consideration thereof he (defendant) would subsequently deed the farm to him. He testified distinctly to this agreement, and we do not find, from the record, that the defendant denied it. There being no understanding that the work was to be performed gratuitously, we do not see why the case is not, in principle, similar to *Schwab v. Pierro*, 43 Minn. 520, 523, 46 N. W. 71. It is true that such an agreement would be void, but, if it can be said that the relationship of the parties gave rise to a presumption that the work was performed gratuitously,—to which, under the circumstances

shown, we do not assent,—it is quite clear to us that this evidence was sufficient to take the case to the jury, and that it was for them to say whether the presumption, if it existed, was not thereby overcome. 14 Am. & Eng. Enc. 781. Upon the whole record, we think the case was a proper one for the jury. The learned trial judge was right in submitting it to them, and wrong when he subsequently concluded that he then erred.

The order appealed from is therefore reversed.

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WARREN FIFIELD v. CEPHAS H. NORTON and Others.

April 20, 1900.

Nos. 12,081—(128).

**Service of Summons by Publication—Opening Judgment by Default.**

In actions where default judgment is rendered on a service of the summons by publication, the defendant is entitled, as a matter of right, under G. S. 1894, § 5206, to an order vacating the judgment, and to be let in to defend the action, upon an application seasonably made to the court, accompanied by an answer setting up a good defense to the action.

**G. S. 1894, § 5206—Adverse Claims—Unrecorded Deed.**

Applications under said section of the statutes are not addressed to the discretion of the court. If the proposed answer contains a good defense to the action, and defendant be not guilty of laches in making his application, sufficient cause for opening the judgment is shown, and the relief is granted as a matter of right. *Lord v. Hawkins*, 39 Minn. 73, followed.

Appeal by defendant Hart from an order of the district court for Benton county, Searle, J., denying a motion to vacate a judgment and for leave to answer. Reversed.

*T. H. Salmon*, for appellant.

*Thomas Van Etten*, for respondent.

**BROWN, J.**

Action to determine adverse claims to real estate. The summons was served by publication under and pursuant to G. S. 1894, § 5204, on the ground that defendants were not residents of the state. A proper affidavit was made and filed, together with a cer-

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tificate of the sheriff of the county in which the action was brought to the effect that defendants could not be found therein, and the summons was published in accordance with the provisions of the statute. There was no appearance by any of the defendants, and default judgment was entered for plaintiff July 29, 1899. On September 30, 1899, defendant Hart, upon a proposed answer and affidavit of merits, moved the court to vacate the judgment and for leave to defend. The motion was denied, and defendant appealed. We are not advised upon what grounds, or for what reasons, the learned court below denied the motion. No reasons are given in the order, and we are not otherwise informed. It should have been granted.

Several questions are raised by counsel for appellant, but only one of them need be considered. The rule is well settled by the decisions of this court that in actions where the summons is served by publication the defendant is entitled, upon proper application, as a matter of right, to an order vacating the judgment, and permitting a defense to be interposed. G. S. 1894, § 5206, provides that the defendant shall be let in to defend in such cases when he makes application therefor, and shows sufficient cause; and the decisions of the court are to the effect that an answer setting up a good defense to the action is "sufficient cause" within the meaning of the statute. *Lord v. Hawkins*, 39 Minn. 73, 75, 38 N. W. 689; *Boeing v. McKinley*, 44 Minn. 392, 394, 46 N. W. 766; *Bausman v. Tilley*, 46 Minn. 66, 48 N. W. 459. Such applications are not addressed to the discretion of the court, as are applications made under G. S. 1894, § 5267, as urged by respondent's counsel. If proper application for leave to defend be seasonably made, and be accompanied with an answer setting up a defense to the action, it is granted as a matter of right. This application was made within a week after defendant learned of the judgment, and there are no suggestions of laches on his part.

It is, however, contended by counsel for plaintiff that the answer does not state a defense to the action; but the contention is not sound. The complaint is in the usual form of complaints in actions of the kind, alleges plaintiff's ownership of the land in general terms, and that the defendant claims some interest therein

adverse to plaintiff. The defendant's proposed answer contains (1) a general denial, and (2) facts showing a connected chain of title from the general government, through various persons, to defendant Hart. It does not allege the recording of some of the deeds composing such chain of title, and for this failure plaintiff insists that the answer is defective. Whether the deeds were recorded is not important. An unrecorded deed of real property conveys title, and is valid against all the world except subsequent good-faith purchasers and creditors. G. S. 1878, c. 40, § 21 (G. S. 1894, § 4180). The burden is upon the subsequent purchaser to show that he took his title in good faith, for value, and without notice of the prior unrecorded deed. *Bank of Farmington v. Ellis*, 30 Minn. 270, 15 N. W. 243; *Roussain v. Patten*, 46 Minn. 308, 48 N. W. 1122. The proposed answer set up a prima facie valid title to the land in the defendant Hart, and the burden to impeach it was upon the plaintiff. The mere fact that the deeds under which defendant claims title were not recorded is not alone sufficient to defeat his title. In addition to this, the plaintiff must show that he has acquired a superior title, either as a purchaser in good faith from one of the intervening owners or as an execution creditor. Upon the complaint and proposed answer, as they now stand, the defendant would be entitled to a judgment should the plaintiff fail to reply setting up some such superior title.

This disposes of the appeal, and it is not necessary to consider any of the other points made by appellant.

Order reversed.

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JOHN W. WATT v. FIRST NATIONAL BANK OF LAKE BENTON.

April 24, 1900.

Nos. 11,815—(25).

**National Bank—Usury—Penalty.**

Appeal from a judgment for \$362 in favor of plaintiff, entered in the district court for Lincoln county. Affirmed.

*John McKenzie and Davis, Kellogg & Severance*, for appellant.  
*F. L. Jones*, for respondent.

**PER CURIAM.**

This case was once before this court on appeal by this appellant from an order refusing a new trial. *Watt v. First National Bank*, 76 Minn. 458, 79 N. W. 509. The identical questions presented on this appeal from the judgment thereafter entered were presented to and argued before this court on the former appeal, were decided adversely to appellant herein, and are therefore *res adjudicata*. As there is a federal question involved, we presume the purpose is to obtain a final judgment in this court.

Judgment affirmed.

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**\*MARY A. TRACY v. MINERVA TRACY.**

April 26, 1900.

Nos. 11,948—(55).

**Homestead—Descent to Widow without Child.**

If there be no child, nor lawful issue of a deceased child, living, the statutory homestead of a deceased person descends, under the laws of this state (G. S. 1894, §§ 4469, 4470), to a surviving husband or wife, free from any testamentary devise or other disposition to which such survivor shall not have assented in writing, and free from all debts or claims upon the estate.

**G. S. 1894, § 4472, Applies Only to Parent Testator.**

The requirements of section 4472, as to making and filing a written instrument by a surviving husband or wife, in case such survivor elects to renounce and to refuse to accept the provisions made in a will, are not applicable in a case where there is no child, nor the issue of a deceased child, surviving the testator. That section is applicable in cases of parent testators only.

**Will without Assent of Wife—Election to Renounce—Reasonable Time.**

In the case at bar the testator was a married man, but his wife has never assented in writing to the testamentary devise. He died childless. Nor did lawful issue of a deceased child survive him. Whether the widow was bound to elect within a reasonable time, as between the

statutory provisions and those made for her in the will, is not decided. but it is *held* that, in any event, there was no improper delay on her part in making an election.

#### **Waiver.**

It is also *held* that, prior to making such election, the widow did not in any manner waive or abandon her right to take under the statute instead of under the will.

#### **Appeal from Probate Court—Judgment.**

Certain other points in the case disposed of.

From an order of the probate court of Wright county setting apart to Minerva Tracy, widow of James Tracy, deceased, a portion of the real estate of decedent as a homestead, Mary A. Tracy, the mother of decedent and the proponent of his will, appealed to the district court for said county. In the district court the appeal was heard before Tarbox, J., who found in favor of the widow. From an order denying a motion for a new trial, Giddings, J., the proponent appealed to the supreme court. Affirmed.

*Charles P. Barker*, for appellant.

*C. A. Pidgeon* and *E. S. Oakley*, for respondent.

#### **COLLINS, J.**

Minerva Tracy, respondent, is the widow of James Tracy, who died testate and childless, April 29, 1896. Nor did there survive him issue of a deceased child. At the time of his death and for some years prior his residence was upon a farm of 160 acres, the tract of land involved in *Towle v. Sherer*, 70 Minn. 312, 75 N. W. 180, an action to establish a lost deed, from which it will be seen that, although the record title to the land was in Sherer, who was a brother-in-law of Tracy, the actual title was in the latter, and this was the final judgment of the court, as entered in December, 1897. Tracy's last will and testament was made but a few weeks before his decease, and this respondent never assented to it in writing. No property was particularly described in this instrument, but in general terms one-half of the estate was devised to the wife, while the testator's mother was given a life interest in the other one-half, with remainder over to a married sister. When the will was presented to the probate court, the widow filed writ-

ten objections to its allowance; the gist of these objections being that the instrument presented was not the duly or lawfully executed last will and testament of the deceased. The court found against the objection, and from an order admitting the will to probate, and appointing an administrator with the will annexed, the widow appealed in July, 1896. By her consent the order appealed from was affirmed by the district court in March, 1897.

In December of that year the widow filed in the probate court written notice that she renounced the will and refused to accept any of its provisions; and, instead, that she elected to take under the statute in such cases made and provided. The litigation with Sherer had at this time been terminated, and judgment had been entered in favor of the plaintiffs; thus establishing the contention that Tracy was the owner of the 160 acres when he died. Simultaneously with this notice the widow petitioned the probate court to set apart, as having descended to her under the statute, Tracy's homestead of 80 acres, the east half of the 160 acres. To this the proponent of the will objected, upon the ground that the widow had not elected to renounce the same within six months after it was allowed in the probate court. The court last mentioned disregarded this objection, and made its order setting apart to the widow, as the homestead of the deceased, the 80 acres in question, and from that order an appeal was taken to the district court.

1. Tracy died testate, but at no time did the respondent assent in writing to any testamentary disposition of his property. She knew nothing of the will, and did not expressly bind herself to its terms. He also died childless, and there did not survive him lawful issue of a deceased child. Under the provisions of the law of this state, the statutory homestead of 80 acres descended to the widow, free from all debts or claims upon the estate. G. S. 1894, §§ 4469, 4470. It is hers, unless in some manner she has waived or abandoned her rights.

2. But counsel for the proponent argues that the widow has waived or abandoned her right to this homestead, because she failed to file, within the statutory period of six months after the will was probated, a written renunciation and a refusal to accept the provisions therein contained. In other words, that she was



bound by the terms of section 4472 to the same extent as if Tracy had left a child, or the lawful issue of a deceased child, surviving him.

We had occasion to discuss this section in *Radl v. Radl*, 72 Minn. 81, 75 N. W. 111, and, calling attention to the phrase, "when a parent dies testate," stated that the language used clearly indicated "that the right to elect to assent or dissent is given for a period of six months after a will is proven, when children survive the testator." A reason why a statutory distinction had been made between a testator with children and one without was also suggested. See also *Jones v. Jones*, 75 Minn. 53, 77 N. W. 551. But we need not seek for reasons which influenced the legislators to confine the operation of section 4472 to parents dying testate, instead of including all persons thus dying. The statute in question is so written, and it does not apply to a testator who has deceased childless. Nor are we called upon in this case to hold that it was incumbent upon the widow to act affirmatively,—that is, to renounce the provisions of the will within a reasonable time after the will was probated; for she filed the notice referred to immediately upon the filing of the mandate of this court in the action with Sherer, who had been asserting title to the whole 160 acres. If she was bound to exercise her right to renounce within a reasonable time, it cannot be claimed that there was an improper delay in so doing.

3. Certain steps taken in the probate proceedings by the widow are relied upon by counsel as clearly and conclusively showing an election upon her part to accept the provisions of the will, and it is contended, because of these steps, that the notice that she renounced the same came too late. It is argued in support of this contention that she "proceeded systematically to recover the title to the alleged homestead at the expense of the estate, and then procured its redemption from the mortgage at the expense of the estate, over a year after the will was probated, representing under oath that it belonged to the estate."

This reference to a recovery of the title to the homestead has, we suspect, reference to the Sherer litigation, while it is fairly to be inferred that what was said concerning a mortgage redemption

bears upon the foreclosure of a mortgage upon the same 160 acres, mentioned in a petition, which she filed pending her appeal from the allowance of the will, asking that redemption be made by the administrator from a foreclosure sale. But, so far as the record shows, not a dollar of money belonging to the estate was expended in the Sherer litigation, nor does it appear from this record that the administrator used any funds of the estate for making a redemption from the alleged sale. These things are simply asserted in the appellant's brief. But the contention of counsel would not be supported if all that is charged had been properly shown.

We have not, thus far, referred to the fact that the order admitting the will to probate, from which the widow appealed, was affirmed, with her consent, in the district court before she filed the notice. Such consent in no manner affected her right to elect as between the statutory provisions and those contained in the will. If Tracy had died intestate, the whole of his estate would have descended to her, under the terms of section 4471, subd. 2. She had a substantial right to protect when she contended that her husband had not duly and legally executed a last will and testament, and when she consented to an affirmance of the order appealed from she merely relinquished the contest; nothing more.

4. From what has been said, it clearly appears that the respondent did not waive or abandon her right to renounce the will, and to refuse to accept its provisions in lieu of the statutory provisions.

5. The point is made that there was no evidence from which the court could find that the 80 acres in question was Tracy's homestead. The petition on which the court acted asserted that it was, and all parties seem to have assumed that this was the fact. It is obvious that this claim is an afterthought, and without merit.

6. It is also urged that the district court was without power, on an appeal from the order in question, to direct that judgment be entered setting apart the 80 acres in fee simple to the respondent. The appeal was probably taken under section 4665, subd. 7, the order being treated by appellant's counsel precisely as if its contents had been made a part of the final decree in the matter of the estate. The legal effect of the order was to set apart and award to the widow the homestead, free and clear of all claims against

the estate; and this was the legal effect of the conclusion of law complained of. Using different language, the district court did nothing more than to sustain the order appealed from on its merits; and, under the provisions of section 4675, judgment is to be entered affirming the decision of the probate court, with costs.

Order affirmed.

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WRIGHT, BARRETT & STILWELL COMPANY and Others v. HARRY P. ROBINSON and Others.

April 26, 1900.

Nos. 11,988—(120).

**Appeal Dismissed—Election of Remedies—Fund in Possession of Receiver.**

The court below made an order prohibiting and restraining a sheriff and the creditor from levying an execution upon and taking possession of certain personal property claimed to be that of the debtors, and alleged to be in the hands of a receiver appointed by said court in an action therein pending. The order provided for the retention by the receiver, who was to sell the property, of a part of the money derived from the sale sufficient in amount to satisfy the execution, with costs, to await any steps which the creditor might take to protect its rights. The latter availed itself of this part of the order, and instituted an action against the receiver to recover the money, and then appealed from the order. The receiver, by order of the court, retains the money to await a final determination of the action, which is still pending. *Held*, that the appeal should be dismissed.

**Election of One Remedy Bars the Other.**

As soon as a choice of alternative remedies proffered by the law is made, and one of these is adopted, the act itself operates as a final and absolute bar as regards the other remedy.

Action in the district court for Ramsey county for the appointment of a receiver of the property of defendants Harry P. Robinson and August F. Osterlind and for other relief. The court having appointed a receiver, the Dispatch Printing Company, a judgment creditor of said defendants, caused a levy to be made on a portion of the property in the hands of the receiver. On motion of the

receiver the court, Brill, J., made an order enjoining the Dispatch Printing Company and John Wagener, sheriff of said county, from interfering with the possession of the receiver, from which order they appealed. Dismissed.

*J. Henry Hintermister, Jr., and Munn & Thygeson, for appellants.  
Stevens, O'Brien, Cole & Albrecht, for respondent receiver.*

COLLINS, J.

This is an appeal from an order made in proceedings to prohibit and restrain the sheriff of Ramsey county and the Dispatch Printing Company, the judgment creditor named in an execution duly issued and placed in the sheriff's hands for service, from levying upon and taking possession of certain personal property claimed to be that of the debtors, but alleged to be in the actual possession of a receiver duly appointed by the court in an action therein pending against said debtors, and by its order to be sold by such receiver on the day of the attempted seizure. Notice of the appeal was served December 6, 1899, according to the record. The order, after certain recitals, and a paragraph prohibiting and restraining the sheriff from further interference with the receiver's possession and acts as directed by the court, contained the following:

"Ordered further, that upon the sale of the property the receiver retain in his hands out of the proceeds thereof an amount equal to the claim of the Dispatch Printing Company on the levy in question in these proceedings, and hold the same for twenty days, to await any proceedings that the Dispatch Printing Company may be advised to take to protect any rights claimed by it."

It appears from the settled "case" as returned here that a sale of the property was made by the receiver, which was confirmed by the court November 25, and out of the proceeds said receiver retained a sum of money sufficient to satisfy the amount of the execution, to await the result of any steps which might be taken by the execution creditor; and, further, that

"Upon the 5th day of December, 1899, the Dispatch Printing Company brought an action against the said receiver, setting out the proceedings aforesaid, including its levy and execution aforesaid, and the order of the court of November 20, and prayed judgment against the defendant therein that defendant be ordered and re-

quired to pay to the plaintiff the sum of \$186.65, with interest thereon from the 5th day of March, 1894, at the rate of seven per cent. per annum, and the further sum of \$29.60, the costs of said levy, together with the costs and disbursements of the action, and that, pending the hearing and determination of the action, the defendant be directed to retain said sum of money in his hands to await the determination thereof; and thereupon the court made an order in said action requiring the defendant therein to retain sufficient of the funds in his hands to satisfy any judgment that plaintiff might obtain in said action until after the final determination thereof, which said order was duly served upon the defendant, and that said action is still pending and undetermined."

By the order of the court restraining the sheriff, from which this appeal was taken, there was substituted and set apart a sum of money sufficient to satisfy the execution in full. It may be true, as contended by counsel, that this procedure was wholly unwarranted, and that it was the legal right of the sheriff and the execution creditor to levy upon and take actual possession of the property. We must not be understood as intimating to the contrary. But that is not the question before us. The creditor, instead of relying upon its right to have the property actually seized by the sheriff, elected to avail itself of the order, and promptly instituted an action to recover the money set apart by the court and retained by the receiver for the very purpose of liquidating any claim the creditor asserted and maintained. It deliberately and formally elected to transfer its claim and lien to the money in the receiver's hands. It brought its action against such receiver. It secured an order directing the retention of the money until the final determination of the litigation, and it caused the due service of such order upon the receiver. That action is still pending, and whatever rights the sheriff or the creditor had or could have asserted and maintained as against the property originally involved remain and may be asserted and maintained as against the money. When the order was filed the creditor had an election of inconsistent remedies. It could appeal, and thus have its rights determined as against the receiver; or it could do what it did do,—institute the action to determine whether or not it was entitled to the money. It could repudiate the order, and all thereof, by appeal, or it could affirm such order by basing an action upon that part which was

favorable. It could not do both. See an exhaustive article on "Election of Remedies" in 7 Enc. Pl. & Pr. 363. As soon as the choice was made, and one of these alternative remedies proffered by the law adopted, the act operated as a final and absolute bar as regards the other.

The appeal is dismissed.

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W. S. JACKSON v. ERIC SEVATSON.

April 26, 1900.

Nos. 12,004—(37).

### **Conversion of Grain—Evidence.**

Certain persons placed wheat in a grain warehouse owned and operated by one E.; receiving wheat tickets, so called, therefor. In an action against a third party as for conversion of this wheat, it is *held* that the evidence was abundant to support a finding that, as between the depositors and E., the transactions were bailments of the wheat, and not sales thereof, and, as a consequence, that title to the property did not pass to E.

### **Demand before Action.**

After the wheat had been shipped by E. on defendant's order, and for his benefit, these depositors demanded of E. that he return the wheat or make payment therefor, which demand was refused. In his answer in this action, and at the trial, defendant asserted title to the wheat on the ground that he had purchased the same, and denied that the depositors or plaintiff, as their assignor, were owners. *Held*, that a sufficient demand had been made prior to instituting the action.

### **Assignment of Chose in Action—Consideration to Be Paid.**

The assignments of the depositors' claims or choses in action against defendant on account of the alleged conversion were full and complete, except that in each was a clause that plaintiff was to pay the assignor when he collected the value of the wheat from defendant, and just what he collected, less such charges and expenses as he paid or incurred in collecting. *Held* valid assignments, as between the depositors, the plaintiff, and the defendant, and that the plaintiff was the real party in interest in this action.

Action in the district court for Cottonwood county to recover

\$518.15 and interest for conversion. The case was tried before P. E. Brown, J., and a jury, which rendered a verdict in favor of plaintiff for \$458.88. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*O. Mosness*, for appellant.

*Wilson Borst*, for respondent.

COLLINS, J.

Action by plaintiff, as the assignee of several persons who were the original owners of certain wheat, to recover the value thereof, on the ground of an unlawful conversion by defendant to his own use, in which the verdict was against the latter.

1. By the testimony it was conclusively established that for some years prior to 1897 one Ewert was the owner of a grain warehouse on a line of railway in the southern part of the state, and engaged in operating the same as a warehouseman, and as a purchaser of wheat for himself and for defendant. He had control of the warehouse, bought wheat for himself as well as for defendant, and had the benefit of the storage, if any. To use the language of defendant when testifying:

"I was to have the wheat I paid for with my money. That was my grain, and I was to ship it out within fifteen days, or else I was to pay him storage."

In other words, such wheat as was purchased by Ewert and paid for with defendant's money became his property, and no storage charges were to be made by Ewert unless it remained in the warehouse more than fifteen days. Ewert's methods of doing business were those customary in such cases. If the wheat placed in the warehouse was purchased outright, tickets were issued directed to Ewert Bros., in which were specified the number of bushels, the grade, the price per bushel, the total sum due, and to whom payable. If no sale was made, but the wheat was stored or deposited in the warehouse, the same form of tickets was issued, but no price was stated or agreed on. The price or amount to be paid was to be determined when the depositor actually made sale.

These tickets were not in the form of those considered in *Weiland v. Krejnick*, 63 Minn. 314; 65 N. W. 631, but there was no

practical difference. Nor did they contain the option clause made a part of the ticket or receipt involved in *State v. Rieger*, 59 Minn. 151, 60 N. W. 1087; but as was said, in substance, in that opinion, it was never contemplated that the wheat represented by the tickets was to become the property of another person until a price was agreed upon and payment made. The evidence was abundant to support a finding that as between the depositors of the wheat, plaintiff's assignors, and Ewert, who owned and operated the warehouse, these transactions were nothing but bailments. They were not sales, and consequently title to the property did not pass out of the depositors.

2. When Sevatson refused to furnish money to Ewert with which to pay for wheat which had previously been deposited in the warehouse, including that in controversy, there were several hundred bushels on hand. The defendant asserted title to it, and put an agent in charge. The depositors demanded of Ewert that he return the wheat represented by the tickets, or that he pay its value. He could not pay, and then aided these depositors in forcing an entrance into the warehouse. The latter then removed all of the wheat on hand, which amounted to 58 per cent. of the number of bushels previously deposited. The balance of the wheat deposited by plaintiff's assignors, 42 per cent. of the total, is represented by the tickets introduced in evidence. No grain remained, for the balance of that deposited had previously been shipped by Ewert on defendant's order.

Counsel for defendant urges that until a demand was made, and his client given an opportunity either to pay the market price or to return the wheat, no action would lie as in conversion. It is an answer to this claim to say that the original owners deposited their wheat with Ewert, not with defendant; that a demand was made of him; and that he, as defendant's agent, had unlawfully shipped it to other agents for defendant, so that the latter finally got the benefit of this wheat without paying for it, as he was to do under his contract with Ewert in order to become owner. And, further than this, he asserted full and complete title to the property in his answer, and insisted upon ownership at the trial. Under all the circumstances, a demand upon him for payment or a



return of the converted property, after demand upon Ewert, was unnecessary. At best, it would have been mere ceremony.

3. The right to follow this grain into the hands of the defendant, and to maintain an action for conversion thereof, is undoubted. *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673.

4. Counsel strenuously contends that the assignments to plaintiff introduced in evidence over his objection are not valid in law, and, upon their face, show that the plaintiff is not entitled to recover, because he is not the real party in interest. This position is taken because in each of these assignments, which are otherwise ample and complete, is a clause that plaintiff is to pay when he collects from defendant, and just what he collects, less expenses and charges which he may pay and incur in making the collection. These clauses merely fixed and postponed the day of payment and the amount to be paid. The assignments were in proper form and irrevocable. They transferred the ownership of the claims and choses in action to plaintiff. The assignors agreed to wait for their money until plaintiff collected from defendant, and that they would then accept what he collected, less proper charges and expenditures in collecting. Subsequent to these assignments the depositors had no enforceable claims, as against defendant or any other party, on account of the transactions with Ewert. The cases cited by counsel from our own state are not in point. *Rock County Nat. Bank v. Hollister*, 21 Minn. 385, and *Third Nat. Bank v. Clark*, 23 Minn. 263. In these cases negotiable paper was indorsed "for collection," and the court held that as the indorsement was obviously restrictive, and only for collection, no title to the paper passed. But here it clearly appears that the assignors intended to part with all title and interest in and to their claims against defendant, without qualification or restriction. The assignments were sufficient as between the parties, and the plaintiff was the real party in interest in this action.

5. We have carefully examined the assignments of error not covered by what has hitherto been said. We find none that are well taken, or which need special notice.

Order affirmed.

## ALBERT LATUSEK v. N. T. DAVIES and Others.

April 26, 1900.

Nos. 12,110—(32).

**Conversion—Redemption by Mortgagor from Chattel Mortgage.**

An action for conversion will lie where a mortgagee who has taken property into his custody for the purpose of foreclosing a chattel mortgage refuses to restore possession to a mortgagor who has made redemption in accordance with the provisions of G. S. 1894, § 4137.

**Findings Sustained by Evidence.**

*Held*, in the action at bar, that the evidence was sufficient to support a finding that the mortgagor paid to the mortgagee the sum due on the mortgage note and all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage, and was also sufficient to sustain the verdict as to the value of the converted property.

**Refusal to Grant New Trial—Absence of Attorney from Trial.**

*Held*, that the trial court did not abuse its discretion when it denied defendants' motion to set aside a verdict taken by default, and to grant a new trial, on the ground of accident or surprise which ordinary prudence could not have guarded against.

Action in the district court for Freeborn county to recover \$1,140 for conversion. The case was tried before Kingsley, J., and a jury, which rendered a verdict in favor of plaintiff and against defendant Davies for \$866.80. From a judgment entered pursuant to the verdict, defendant Davies appealed. Affirmed.

*J. A. Sawyer*, for appellant.

*Henry A. Morgan, H. H. Dunn and H. C. Carlson*, for respondent.

**COLLINS, J.<sup>1</sup>**

In an action for conversion it is essential to prove a general or special property in the plaintiff, the right of possession at the time of the conversion, and that the defendant has converted it to his own use. The right to recover is then established. *Hodge v. Eastern Ry. Co.*, 70 Minn. 193, 72 N. W. 1074. A mortgagor may

<sup>1</sup> LOVELY, J., having been of counsel for plaintiff, took no part.

maintain such an action against a mortgagee who has refused to restore possession of property which he has taken into his custody under and by virtue of a condition broken for the purpose of foreclosure and sale under a chattel mortgage, where redemption has been made in accordance with the provisions of G. S. 1894, § 4137.

In the case at bar, which is of the character above mentioned and was tried, and a verdict rendered, in the absence of appellant, who is the defendant primarily liable, and his counsel, it is contended that from the evidence contained in the settled case it appears that an inadequate sum of money was paid when the mortgagor plaintiff attempted to redeem his property, then in the mortgagee's possession at his home, and about to be sold to satisfy the mortgage debt, with costs and expenses of foreclosure. Two witnesses, one of whom paid the money in the presence of the other, testified that they made a careful computation of the amount due upon the note, and added to this \$64.61 for reasonable and lawful charges and expenses incurred by the mortgagee in the care and custody of the property, or otherwise arising from the mortgage; that they found the total to be \$129.61, and that this was received by the mortgagee, the latter stating that he would apply it on the claim, but would not surrender possession. These witnesses also testified that the mortgagee would not tell what he claimed to be due. We are clearly of the opinion that on the testimony of these witnesses, who were very competent to make the computation, who state that they were very liberal in their calculations, and that the amount paid was the maximum sum due, the jury was justified in finding that redemption was in fact made.

It is also contended that there was no evidence as to the value of the property converted, which consisted of several articles, and in the complaint was alleged to be of a total value of \$640. It is true that the testimony as to value is not, in all probability, as clear and explicit as it would have been if defendant's counsel had been present; but, as we understand it, the plaintiff fixed a valuation of \$800, while another witness placed it at \$640. The latter evidently referred to the property in defendant's possession when the demand was made. Counsel insists that the witness was then testifying as to the value of that part of the property exempt from

execution sale. If this was what the witness meant, it fails to aid the defendant, for some of the property held by defendant was not exempt, and, necessarily, the value of all would be more than \$640. The court instructed the jury that as this was the value alleged in the complaint, their verdict could not be in excess of that sum with interest, and this instruction was not disregarded. We are satisfied that there was sufficient evidence to support the verdict on the question of value.

Counsel further contends that the court below committed reversible error when, upon certain affidavits presented, it refused to relieve defendant of his failure to be present when the case was called for trial, to set aside the verdict, and to grant him a new trial.

There was not very much controversy over the facts as stated in the moving and opposing affidavits read upon the hearing of the motion. Defendant was a business man, residing at Albert Lea, in this state. His son was in partnership with him. His attorney resided at Owatonna, fifty miles distant, but connected by two lines of railway, with several trains each day, and with telegraph and telephone communication. At the December, 1898, term of district court held at Albert Lea, defendant and his son had several causes for trial, but for the accommodation of their attorney, who is the attorney in this action, all were postponed until an adjourned term, to be held in February, 1899. The day for this adjourned term was finally fixed for Monday, February 6, at 10 a. m., and it is plain that the attorney knew or ought to have known of it. The court convened at the hour fixed. This case was the first on the calendar, and another of defendant's cases was the second. The defendant was not present, nor was he represented by counsel. The case was called, but, on account of their nonappearance, a recess was taken until 2 p. m. At the hour last mentioned the court directed that the trial proceed. A jury was impaneled, testimony taken, and a verdict rendered, in the absence of defendant and his counsel. The latter reached Albert Lea that evening at 9 o'clock, appeared in court next morning, and obtained a stay for thirty days. At the expiration of this period he obtained another stay of thirty days. He allowed this stay to expire, and then, more

than two months after the rendition of the verdict, procured an order to show cause why the verdict should not be set aside, and the apparent neglect excused.

Why he did not make this motion earlier has not been shown on appeal, and we have no doubt the delay had much to do with the conclusion of the trial court that the application should be denied. One of the excuses offered was that defendant was sick, and confined to his house, about and at the time fixed for the adjourned term. Yet it appears that on February 6, at about 8.30 in the morning, the sheriff of the county went to defendant's house, and served some papers upon him; that they had a conversation in respect to the term of court, in which the sheriff stated that it would open at 10 a. m., and was informed by defendant that he expected and supposed that his counsel would be present at that time. Defendant seems to have paid no further attention to his cases, except that in the afternoon, in response to an inquiry by telephone, he directed his son to advise his attorney to be present in court on the morning of February 7.

From the affidavit of the attorney it appears that a serious and sudden sickness of his wife prevented his going to Albert Lea on February 5, as he had intended; that he unsuccessfully attempted to communicate by telephone; that on Monday forenoon he went to the railway station for the purpose of taking a train to Albert Lea; that he then communicated with some one at the last-mentioned place, but by reason of the great noise made by trains upon the adjoining tracks he "could not there understand what came over the wires, save only that he understood that it was not imperatively necessary for him to be at Albert Lea before that evening." With whom he was talking over the wires, or from whom came the information, or whether the necessity referred to had any connection with the case at bar, or even with the term of court, was not stated in his affidavit. Acting upon this understanding, —which was no understanding at all,—the attorney abandoned his journey, returned to his office, and late in the afternoon started again. There were two trains about to start for Albert Lea when he was at the depot, and, had he taken either, he would have reached Albert Lea in time for the trial.

It is not improbable that if, on the showing made, the court below had relieved the defendant from his default, and had allowed him to be heard, its action could have been sustained. But this was not done. The court held that no sufficient excuse had been presented, and we cannot say that it erred, without placing our reversal on the ground of a clear abuse of discretion on the part of such court. Manifestly, there was no abuse of discretion. The defendant and his attorney were extremely negligent. They paid no attention to cases which they knew or ought to have known would be speedily brought to trial at the adjourned term, and about the only excuse offered is they supposed nothing would be done on the first day. Ordinary prudence demanded more than this of defendant. The penalty for his neglect is rather severe in this case, but for that reason alone he cannot be relieved. Nor, on the question of discretion, should it be forgotten that there was unnecessary delay, almost amounting to neglect, in failing to make prompt application for relief. A much stronger case for an exercise of discretion would have been presented had steps been taken at once, so that, if plaintiff desired, a new trial could have been had at the pending term, instead of postponing the cause to some time in the future.

Judgment affirmed.

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**CITY OF CROOKSTON v. BOARD OF COUNTY COMMISSIONERS OF  
POLK COUNTY.**

April 26, 1900.

Nos. 12,142—(52).

**Title of Act Creating Municipal Corporation.**

An act of the legislature creating a municipal corporation, and granting to it legislative, judicial, police, taxing, and other ordinary powers, embraces but one subject; the separate provisions of the act, covering these powers generally as well as in detail, being simply parts of the whole, and absolutely essential to make a whole.

**Same—Payment to City of Penalties Collected on City Taxes.**

That provision of an act of the legislature entitled "An act to amend and consolidate the charter of the city of Crookston" (Sp. Laws 1885, c. 1, subc. 5, § 16), which section requires the county treasurer to pay over to the city treasurer all interest and penalties which have been collected on account of taxes levied for city purposes, and also all interest received thereon from county depositaries, is not open to the objection that it contravenes the constitution (article 4, § 27).

**Same—No Conflict with General Tax Law.**

The provision referred to (section 16, *supra*) in no manner conflicts with the general tax laws relating to penalties and interest collected on account of taxes.

Appeal by defendant from an order of the district court for Polk county, Watts, J., overruling a demurrer to the complaint. Affirmed.

*A. R. Holston and A. A. Miller*, for appellant.

*L. E. Gossman*, City Attorney, and *De Forest Bucklen*, for respondent.

**COLLINS, J.<sup>1</sup>**

This is an action to recover the amount of certain interest and penalties alleged to have been collected by the county treasurer on account of taxes which have been levied for city purposes on property within the limits of plaintiff city for a series of years prior to and including 1899, and also interest which the county has received, it is claimed, on account of the amount so collected, from county depositaries. The right of the city to recover is predicated upon an act of the legislature entitled "An act to amend and consolidate the charter of the city of Crookston," now found as Sp. Laws 1885, c. 1. The particular sections in question are in subchapter 5, entitled "Finances," and are numbered 15 and 16. Section 15 provides for the transmission by the city council to the county auditor, and on or before October 1 of each year, of a statement of all taxes levied by such council for city purposes, which taxes are to be collected and payment is to be enforced with, and in the same manner as are, state and county taxes; that is, by the

<sup>1</sup> BROWN, J., did not sit.

same officials and in the same way. Subchapter 5, § 16, is as follows:

“The county treasurer of Polk county shall pay over such taxes, together with all interest and penalties which shall be collected on account of the same when collected, to the treasurer of said city in the several settlements of the funds to be so paid over, as provided by general law. Said county treasurer shall account for and pay over to the city treasurer such portions of the interest paid by banks with whom funds of said county are deposited as have accrued upon funds arising from city taxes and assessments so deposited with such county funds or parts thereof.”

By a general demurrer to the complaint, the defendant's counsel deny the right of the plaintiff to recover from the county, in whose treasury the money has been retained; their contention being—First, that the above-quoted express and unambiguous provisions as to payment by the county treasurer to the city treasurer of all interest and penalties which shall have been collected on account of city taxes, and all interest thereon which has been paid by county depositaries, are of no validity, for certain specified reasons; and, second, that because of its title the act contravenes the provisions of article 4, § 27, of the state constitution, which requires that “no law shall embrace more than one subject, which shall be expressed in its title.”

1. There is not a particle of merit in the first proposition, and to discuss it is really a waste of time. There is no conflict between the charter provisions under consideration and those contained in G. S. 1894, §§ 1599, 1601, 1602, 1605, 1613. And, if there was, it would not follow that the former, instead of the latter, would be invalid. But when property is sold to a purchaser at a delinquent tax sale, as provided in section 1599, or when after it has been bid in by the state for want of a purchaser (section 1592), and the right of the state has been assigned, as authorized in section 1601, the city taxes and the penalties and interest, if any, have been collected, and the municipality is entitled to receive the money. Subsequent payments to the county treasurer in redemption or otherwise do not concern the city, and none of the serious results to purchasers at the tax sales, or to holders of certificates of assignments, mentioned by counsel for the defendant, can follow.



2. We have repeatedly considered the constitutional provision relied on, and nothing of value can be added to the cases found in our reports upon this particular subject. The title of the act clearly expresses its subject, which is a consolidated and amended charter for the plaintiff city, and in the act we should naturally expect to find such provisions as might be necessary for the proper government of a municipality. Among the most important of these expected provisions would be one relating to taxation, and no single provision of a charter could be more germane to its subject, as expressed in the title, than one relating to the finances of the city. And when providing for finances we might anticipate that the legislature would arrange the details found in sections 15 and 16, for these details are strictly within the scope of the enactment. More than this, not only should the city receive such penalties and interest as may accrue on account of delinquent taxes assessed and levied for its own use, but an examination of a large number of charter enactments in this state has disclosed the fact that the provision in section 16 on which this action is founded is so common as to be practically universal. A provision of this character has a just and proper reference to the subject of a municipal charter expressed in the title of the act, and is manifestly appropriate in that connection. The generality of the title is no objection, if it be sufficient to give notice of the general subject of the proposed legislation, and of the interests likely to be affected. So it has been held repeatedly that an act creating a municipal corporation, and granting to it legislative, judicial, police, taxing, and other ordinary powers, embraces but one subject; the separate provisions of the act covering these powers generally, as well as in detail, being simply parts of the whole, and absolutely essential to make a whole. To sum it all up, in the language of counsel for respondent:

"It is certainly germane to the subject of incorporating a city, and to the subject of amending and consolidating the charter of a city, to provide for the details of the management of the affairs of the city, and to find named the agencies or channels through which it might act, and the method of raising money by taxation, and for the payment of the same by the county authorities to the

city. The details of these transactions are not required to be set forth in the title of the act."

As bearing upon this case, see *City of St. Paul v. Colter*, 12 Minn. 16 (41); *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923; *State v. Anderson*, 63 Minn. 208, 65 N. W. 265; *Putnam v. City of St. Paul*, 75 Minn. 514, 78 N. W. 90.

Order affirmed.

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MINNEAPOLIS LAND COMPANY v. CARRIE E. McMILLAN.

April 26, 1900.

Nos. 12,152—(157).

**Pleading—Promissory Note Executed under Duress.**

*Held*, on the allegations in the answer, that the facts and circumstances therein detailed and relied upon as a defense in an action upon promissory notes were insufficient to show that said notes were executed and delivered under duress, nor did they show that they were without consideration.

**Consideration—Forbearance to Enforce Legal Right.**

If a person has a right at law, his forbearance to institute proceedings to protect or enforce it is a valuable consideration for a promise to pay.

Action in the municipal court of Minneapolis to recover a balance of \$109.10 and interest on two promissory notes. The court, Holt, J., granted a motion for judgment on the pleadings in favor of plaintiff for the amount demanded. From a judgment entered pursuant to the order, defendant appealed. Affirmed.

*Helliwell & Keyes*, for appellant.

*M. H. Boutelle and Nathan H. Chase*, for respondent.

COLLINS, J.

Action upon promissory notes payable to one Flora Bergman, and by her indorsed and transferred to plaintiff. The answer sets forth in detail the facts and circumstances under which said notes were executed and delivered, and which, it is claimed by defend-

ant's counsel, fully establish their contention that the same were obtained by duress, and were without consideration. It is also alleged that plaintiff had knowledge of all these facts and circumstances, and was not a purchaser in good faith and for value. On plaintiff's motion, judgment on the pleadings was ordered, and rendered for the full amount of the notes. The appeal is from this judgment. It is hardly necessary to say that the allegations of the answer are to be accepted as true, and, if by any fair construction a defense has been pleaded, the motion should have been denied, and this judgment will have to be reversed.

The facts and circumstances referred to, as set forth in the answer, are these: James McMillan & Co. was a domestic corporation, engaged in receiving furs, in shipping the same, and in tanning sheep pelts from, for, and on account of a large number of other persons. The defendant was a stockholder in, and the secretary and treasurer of, the corporation, having over \$7,000 invested therein. Flora Bergman was the owner and holder of a bond issued in April, 1894, by said corporation, in the sum of \$1,000. On March 18, 1898, the principal of this bond had been reduced by previous payments to \$700. There was nothing presently due, either as principal or interest. On that day Bergman's agent presented the bond to the corporation, and demanded immediate payment of the balance, which was refused on the ground that nothing was then due. Bergman then threatened that, if this balance of \$700 was not paid at once, with accrued interest, application would be made to the district court for the appointment of a receiver for the corporation, under the provisions of the state insolvency law. A petition for the appointment of a receiver in insolvency was duly drawn, of which notice was given to the corporation. The defendant then alleged that the presentation of this petition to the court, as was threatened, would have brought financial disaster on the corporation, and would have caused its failure in business, and that to prevent this, and the consequent and irreparable loss to herself, she exchanged her own personal checks upon a bank, and her own promissory notes, aggregating \$700 in amount, payable to Bergman, for the bond in question. The instruments sued upon are two of these notes. She then turned

the bond over to Bergman as collateral security for the payment of said notes.

It was also alleged that this was all done under protest, and solely to prevent the serious consequences before mentioned; and that at this time the actual value of the bond did not exceed \$150; but in no manner was it explained why its face value had been reduced more than 75 per cent. There were no allegations in this answer of fraud or false pretense on the part of Bergman when demanding payment, or when obtaining defendant's checks and notes in exchange for the bond. On the contrary, it was averred by defendant that she knew that the balance of the bond was not due and payable when the exchange was made; and, further, that she then and there well knew that the actual value of the bond did not exceed \$150. The only allegations in the answer bearing upon the solvency or insolvency of the corporation at the time Bergman threatened to petition for a receiver under the insolvent law, and caused such a petition to be prepared, are as follows:

"That said Jas. McMillan & Co. was indebted to said Bergman at said time for no sum whatever, and that said Bergman did not have legal cause for making said application for the appointment of a receiver for said Jas. McMillan & Co., under chapter 41 of the general statutes of the state of Minnesota, or otherwise; that said fact was well known to said Bergman, to said Jas. McMillan & Co., and to the defendant herein."

That the balance of the bond had not yet matured would not, of itself, disqualify Bergman from filing the petition. The claim against the corporation held by her would have been provable and allowable had the estate gone into the hands of a receiver, and this was sufficient to qualify her to become a petitioner, under the law. *Citizens' Nat. Bank v. Minge*, 49 Minn. 454, 52 N. W. 44. And the averment that Bergman did not have "legal cause" for making an application to the court in insolvency proceedings is a very noticeable instance of pleading a conclusion of law instead of facts. It was necessary to allege facts from which this conclusion could be deduced, not the conclusion itself. So that there was nothing in the answer from which it could be gathered that Bergman was not justified in contending that the corporation was insolvent, and

that a receiver should be appointed for the benefit of its creditors. The defendant was not compelled to execute the notes to satisfy a wrongful claim or unjust demand made upon the corporation, or upon herself, which would, if not complied with, have resulted in serious disaster and loss of property. There was no duress in this case on any of the authorities, and a contention that there was is disposed of by calling attention to *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115; *De Graff v. County of Ramsey*, 46 Minn. 319, 48 N. W. 1135; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217. The opinion in the case last cited is quite exhaustive on the subject of duress, and has been referred to in *Panton v. Duluth G. & W. Co.*, 50 Minn. 175, 52 N. W. 527; *Cunningham v. Minneapolis S. Y. & P. Co.*, 59 Minn. 325, 61 N. W. 329; and *American B. M. Union v. Hastings*, 67 Minn. 303, 69 N. W. 1078.

Nor is there any merit in the claim that the notes were without consideration. Not only did Bergman refrain from proceeding against the corporation, as she had proposed to do, justified by the situation, as we must assume, on the condition of the answer, but she transferred the bond to defendant, or, as alleged by the latter, it was exchanged for the checks and notes. If a person has a right at law, his forbearance to institute proceedings to protect or enforce it is a valuable consideration for a promise to pay. See cases cited in 6 Am. & Eng. Enc. (2d Ed.) 747.

A few words more on the point made by counsel, that there was no consideration, because the bond was not worth its face value. The defendant was stockholder, secretary, and treasurer of the corporation. She knew and alleged that this bond was of no greater value than \$150. Her agreement to pay \$700 therefor merely indicates that, for some undisclosed reason, she was willing to pay more than it was worth. The consideration for the notes may have been inadequate, but this, of itself, does not invalidate the same.

Judgment affirmed.

**CHARLES W. THOMPSON v. GREAT NORTHERN RAILWAY COMPANY.**

April 27, 1900.

Nos. 11,801—(30).

**Railway—Personal Injury to Conductor.**

This is an action to recover damages for the loss of the plaintiff's right leg caused by the giving way of one of the rods or grab irons constituting the ladder on the side of a car. *Held:*

**Inspection of Grab Irons.**

1. That the defendant's inspectors, when inspecting the ladder, were not bound to apply any physical force to the grab irons to discover latent defects, unless a careful inspection by the eye disclosed some defect or probable weakness. But, if such careful observation would have disclosed that one of the grab irons, or the bolt fastening it to the car, was out of place, the inspectors would have been guilty of negligence if they failed to discover the open condition of the grab iron, and apply all reasonable physical tests to determine the cause of its abnormal condition, and whether such condition was a safe one.

**Verdict Sustained by Evidence.**

2. That the verdict for the plaintiff is sustained by the evidence.

**Refusal to Charge Jury.**

3. That the trial court did not err in refusing certain requests for instruction to the jury, and that the charge as given was correct.

**Verdict not Excessive.**

4. That an award of \$7,500 as damages to the plaintiff is not so excessive as to justify any interference with the verdict.

Action in the district court for Kandiyohi county to recover \$25,000 for personal injuries. The case was tried before Powers, J., and a jury, which rendered a verdict in favor of plaintiff for \$7,500. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*C. Wellington*, for appellant.

*F. D. Larrabee*, for respondent.

START, C. J.

The plaintiff on January 21, 1897, was a freight train conductor on one of defendant's trains. While attempting in the line of his duty to climb to the top of a car and using the ladder on the side thereof, one of the rounds gave way, whereby he was thrown to the ground, and the wheels of the car passed over his right leg, inflicting such injuries that it was necessary to amputate the leg below the knee. This action was brought to recover damages for such injuries on the ground that they were caused by the negligence of the defendant in failing properly to inspect and keep in a safe condition the car in question. Verdict for the plaintiff for \$7,500, and the defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial. The assignments of error raise three general questions for our consideration. They are: Is the verdict supported by the evidence? Did the trial court err in its instructions to the jury? Are the damages awarded excessive?

1. The defendant's first contention is that there was no credible evidence tending to show any actionable negligence on its part.

Except as to one matter, there is little conflict in the evidence. It is practically admitted that the plaintiff was injured as he testified, that he was in the discharge of his duty as the servant of the defendant at the time, and that he was not guilty of contributory negligence. The ladder from which the plaintiff fell was made of several curved iron rods some eighteen inches long and five-eighths of an inch in circumference. Each end of the rods was flattened, with a hole through it, and was one-half of an inch in thickness. These rods or "grab irons," as they are usually called, were fastened to the side of the car by iron bolts passing through each end, and screwed into the corner post and side of the car, with the inside of the head of the bolt pressing against the outside of the flattened end, and the inside of the latter against the outside of the car. The plaintiff stepped upon the lower grab iron of the ladder, and the end which was fastened to the corner post of the car gave way by reason of the breaking of the screw bolt, and he was thrown down, and injured, as stated. One piece of the bolt remained in the corner post, and the other hung in the grab iron. Both were pre-

served, and were received in evidence on the trial of this case, and exhibited, with the corner post, to this court, on the hearing of this appeal. There was an old flaw or crack in the bolt at the joint where it broke, extending from one side to its center, which was the cause of the bolt breaking and the grab iron giving way. This defect could not have been discovered by a visual inspection of the grab irons, which is the usual and approved method of inspection, unless the screw bolt or grab iron were out of place.

This brings us to the pivotal and disputed question in this case, which is: Could the defendant, by the exercise of ordinary care, have discovered before the accident the unsafe condition of the grab iron? It was the duty of the defendant to inspect the grab irons, and the answer to the question depends upon whether the evidence is sufficient to support a finding that the defendant might have discovered the condition of the grab iron by a reasonably careful inspection. Two inspections, by different inspectors, were given the car in question,—one before it was loaded, and the other after it was placed in the train,—and neither of the inspectors found any defects in any of the grab irons. The system of inspection adopted by the defendant and followed by the two inspectors was by observation or sight as to the body of the car, including the grab irons, and, as to the wheels, by sounding them with a hammer. It must be conceded that the system is not a negligent one, and, if the inspectors carefully observed the grab irons, and found none of them out of place, and nothing to indicate any defect or weakness therein, the inspection was a reasonably careful one, and all that the law demanded. The inspectors were not bound to take off the grab irons, or apply any other physical force to discover latent defects, unless a careful inspection by the eye would have discovered some defect or probable weakness. If such careful observation would have disclosed that either the grab iron or the bolt in question were out of place, it would have been a danger signal, imperatively requiring further investigation, and the application of all necessary and reasonable physical tests to determine the cause of the abnormal condition of the grab iron, for upon the safe condition of the ladder depended human life and limb.

The evidence on the part of the plaintiff tending to show that the



grab iron or the bolt holding it to the side of the car was out of place when the car was inspected, briefly summarized, is this: The plaintiff's brother testified that he removed the part of the bolt which remained in the side of the car, and that the upper end thereof—that is, the point where the break occurred—was flush or even with the outside of the car, and that the part of the bolt which remained in the hole in the grab iron was just one and one-eighth of an inch in length from the inside of the bolt head. If this be true, it would conclusively follow that at the time the inspection was made, either the end of the grab iron was pressed out from the side of the car at least one-half of an inch, or that the inside of the head of the bolt was out the same distance from the outside of the grab iron, for the latter was only one-half of an inch in thickness. That the upper part of the bolt was just one and one-eighth of an inch in length, measuring from the inside of its head, is admitted. But the defendant claims that the testimony of the plaintiff's brother is absolutely incredible, because, as it is claimed, he testified on a former trial of this action to a different state of facts as to the part of the bolt remaining in the car, and that the physical facts disclosed by an examination of the two parts of the bolt and the car still conclusively show that the point at which the bolt was broken was in fact at least one-half of an inch below the outside of the car, as testified to by defendant's witnesses who repaired the car after the accident. If it be true that the break in the bolt was one-half of an inch below the outside of the car, then it would follow that the grab iron rested firmly against the side of the car, that the bolt was in its proper place, and that, at the time the car was inspected, there was nothing which an inspection by observation could have disclosed indicating a defect or probable weakness in the grab iron.

The trouble, however, with this claim of the defendant, is that, while there were discrepancies in the testimony of the plaintiff's witness, still the so-called "physical facts" corroborate, in a measure, his testimony on the last trial, for a careful examination of the two parts of the bolt and the corner sill of the car to which the grab iron was fastened discloses with reasonable certainty that the break in the bolt occurred at a point not more than one-fourth of an

inch below the outside of the car. This would leave a space of one-fourth of an inch between the outside of the car and the inside of the grab iron, or the bolt out of place the same distance. If such were the case, it would seem to follow conclusively that the trained eye of an experienced inspector ought to have detected the defect at once, and that he was negligent if it did not do so. But, in any event, this was a question for the jury. The defendant's own evidence indicates quite clearly that such would have been the case. The superintendent of its car shops testified, in effect, that an inspector passing by a car looks over the grab irons, the same as he would the door fastenings. Any grab iron which is out of place is easily detected, for it will drop down or away from the sheathing of the car,—tip out or tip down. Upon the whole record we are of the opinion that the evidence fairly sustains the finding of the jury by their verdict to the effect that the defendant might have discovered, before the accident, the unsafe condition of the grab iron by a reasonably careful inspection of the car, and that it was, therefore, guilty of negligence in the premises.

2. The defendant assigns as error the refusal of the court to give to the jury its third request, which was this:

*“Further, that the duty incumbent upon the defendant to inspect the car in question is shown to have been performed, by the undisputed evidence in the case, by two inspectors, made on the day that the car was put into the train of which Thompson was the conductor, going westward, and that all the defendant was required to do in that behalf was to use ordinary and usual care, such as is used by railway companies in the general transaction of their business in that respect; and that, if the defendant performed its duty in that behalf, then it is not liable in this action.”*

The request was rightly refused, for the reason that it contains two independent propositions, one of which—the one we have italicized—was manifestly erroneous, for it, in effect, declares as a matter of law that the defendant had discharged its duty as to the inspection of the car.

It is further urged that the trial court erred in refusing the defendant's fifth request, which was this:

*“Further, you are not permitted to erect in your own minds any*

particular standard or grade, or decide any particular method of doing business to be negligent, unless the evidence in the case convinces your minds that the method adopted by the company in this respect was in and of itself such a method as a man of ordinary care and prudence, or a railway company exercising ordinary care and prudence in that respect, under those circumstances, would not have adopted and practiced."

It was not error to refuse this request, for it was misleading. The request deals with the method or system of inspection adopted by the company. The question, however, at issue was not whether the system of inspection by observation adopted by the defendant was the proper one, but the question was whether its inspectors properly executed the system; that is, carefully observed the exterior or open condition of the car, including the grab irons and bolts.

Error is also assigned as to the giving of certain instructions by the trial court which were excepted to on the ground that they left the question of what would be a proper inspection of the car to be determined by the jury "out of their own minds," not from the evidence in the case. The whole charge of the trial court on the question must be considered together. So considering it, it is clear that the exceptions are without merit. The charge, taken as a whole, was a clear and correct statement of the law applicable to the case.

3. The last claim to be considered is that the damages awarded are excessive. The award is certainly liberal. But the plaintiff was, at the time of the accident, about 40 years old, in the prime of manhood, earning, as a railway conductor, \$90 a month. The injury he received totally incapacitated him from following his chosen occupation, and he must seek a new field of labor, handicapped by the loss of his good right leg. We are not prepared to say that the damages awarded him are so excessive as to justify us in disturbing the verdict.

Order affirmed.

JOSEPH C. HELM v. SMITH-FEE COMPANY and Others.

April 27, 1900.

Nos. 11,886—(9).

**Insolvent Corporation—Collection of Fund for Creditors.**

The equity rule that, where one of many parties having a common interest in a trust fund successfully prosecutes proceedings to collect it for the benefit of all interested in it, he is equitably entitled to reimbursement for his reasonable expenses in the premises out of the fund before its division, applies to an action to enforce stockholders' liability, where the action is so prosecuted by one creditor for the benefit of all.

**Same—Allowance to Plaintiff's Attorney.**

The trial court erred in denying the petition herein for such an allowance for the services of the plaintiff's attorney.

Action in the district court for St. Louis county to enforce the liability of stockholders in defendant corporation. J. H. Whitely, attorney for plaintiff, petitioned the court to be allowed as compensation for his services the sum of \$1,100, or such other sum as the court might deem just and reasonable. From an order, Moer, J., denying his petition, he appealed. Reversed.

*J. H. Whitely*, pro se.

*J. L. Washburn* and *W. D. Bailey*, for respondent Moore.

START, C. J.<sup>1</sup>

This action was brought under G. S. 1894, c. 76, for the purpose of enforcing the stockholders' liability, and was prosecuted by the plaintiff on behalf of himself and all other creditors of the defendant corporation. Other creditors intervened, and proved their claims, and the action was prosecuted to final judgment against the stockholders. As a result of the prosecution of the action, there will be realized a common fund amounting to over \$13,000, which will be available for distribution to the several creditors. The attorney for the plaintiff petitioned the trial court for an allowance out of this fund for his services in prosecuting the action. No objection was or is here made on the ground that the allowance

<sup>1</sup> LEWIS, J., took no part.

should be made to the plaintiff, and not directly to his attorney. The court made its order denying the petition, stating, in a memorandum attached thereto, that there was nothing in the statute warranting the allowance, and no authority to sustain such a claim.

While the memorandum is no part of the order (see *Kertson v. Great Northern Exp. Co.*, 72 Minn. 378, 75 N. W. 600), yet it would seem, from the whole record, that the trial court must have denied the petition as a matter of strict legal right, and not as a matter of discretion. However this may be, we are of the opinion that, in the exercise of a sound discretion, the trial court ought to have allowed the petitioner a reasonable amount for his services. The power to make such an allowance does not depend upon any statute, but upon the equity rule that where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceedings to collect it for the benefit of all interested in it, he is equitably entitled to reimbursement for his reasonable expenses in the proceedings out of the fund before its division. Now, no one creditor is entitled to enforce the liability of stockholders of a corporation for his own exclusive benefit. He must prosecute the action for the benefit of all creditors who elect to become parties to the action and exhibit their claims, and, where he assumes the burden of successfully prosecuting the action for the benefit of all, equity requires that he be reimbursed for his outlay from the common fund secured by his efforts. *Seibert v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 39, 59 N. W. 822; *Dwinnell v. Badger*, 74 Minn. 405, 77 N. W. 219.

The correctness of this proposition is substantially conceded by the respondent *Watson S. Moore*, but he claims that it would be inequitable to grant the petition in this case as against him, because he is both a creditor and a stockholder of the corporation; that nearly all of the money to be brought into the common fund by the plaintiff's action will be contributed by him as a stockholder; that approximately two-thirds of the fund will be distributed to him as a creditor, as an offset pro tanto to his stock liability; and that the plaintiff and his attorney opposed the allowance of his claim as a creditor, taking an appeal from its allowance to this court (see

Helm v. Smith-Fee Co., 76 Minn. 328, 79 N. W. 313); therefore he ought not to be compelled, as such creditor, to pay the petitioner, as attorney for the other creditors, for his services in opposing his claim. This is a good reason why the whole amount of the petitioner's fees as attorney in the action ought not to be paid from the common fund, but it is no reason for refusing him any compensation whatever. The undisputed evidence in this case shows that it would be inequitable to allow the entire amount of the reasonable value of the services rendered by the plaintiff's attorney in this action out of the common fund, and that his claim should be liberally reduced. On the other hand, it is equally clear from the evidence that he is entitled to an allowance for such services as were rendered for the common benefit of all of the creditors.

It follows that the trial court erred in denying the petitioner any compensation, and the order is reversed, and a rehearing upon his petition is granted.

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JOSEPH H. McCORD v. ROBERT J. KNOWLTON and Others.

April 27, 1900.

Nos. 11,998—(35).

### **Conveyance in Fraud of Creditors.**

In an action brought by a creditor to set aside a conveyance of real estate by a father to his son and daughter, *held*:

### **Deed and Agreement for Future Support.**

1. That the deed of conveyance was executed contemporaneously with the execution by the grantees of an agreement for the future support of the grantors, and that the two instruments, taken together, show that each was executed in consideration of the other, and that the deed was *prima facie* a voluntary conveyance, and void as to creditors.

### **Domestic Services of Daughter of Grantor.**

2. Domestic services performed by a daughter, of legal age, while a member of her father's household, will be presumed to have been performed voluntarily; and, in the absence of a prior agreement or understanding that she should receive compensation, a subsequent conveyance to her in consideration of such services is void as to creditors of the father.

**Remedy Granted by G. S. 1894, §§ 4506, 4507, not Exclusive.**

3. G. S. 1894, §§ 4506, 4507, do not provide an exclusive remedy in the executor or administrator. The creditor may proceed independently of the statute.

**Order of Probate Court Allowing Claim.**

An order of the probate court allowing a claim against an estate, if not appealed from, has the effect of a judgment, and the statute of limitations does not apply to the original claim.

Action in the district court for Sherburne county by Evan B. McCord against Robert J. Knowlton, Elizabeth A. Knowlton, Georgianna B. Orrock and James Orrock, personally and as administrator of the estate of George W. Knowlton, deceased, to set aside as fraudulent as against creditors a conveyance and transfer executed by the said George W. Knowlton and Elizabeth, his wife, to said Robert J. Knowlton and Georgianna B. Orrock (formerly Knowlton). The case was tried before Searle, J., who found in favor of defendants, and from a judgment entered pursuant to the findings, plaintiff appealed. After the entry of judgment Joseph H. McCord, executor of Evan B. McCord, deceased, was substituted as plaintiff. Reversed.

*Charles S. Wheaton and James C. Tarbox, for appellant.*

*Frank T. White and Edson S. Gaylord, for respondents.*

**LEWIS, J.**

The plaintiff, as a creditor of the grantor, brings this action to set aside a transfer of 120 acres of land and certain personal property by George W. Knowlton to his son and daughter, defendants Robert J. Knowlton and Georgianna B. Orrock, upon the ground that there was no consideration, the same being voluntary conveyances, and void as to creditors. The court below ordered judgment for defendants, and plaintiff appeals, assigning as error that the evidence does not support the findings as to consideration of the transfers, and that the findings of fact do not support the judgment.

It appears from the record that the personal property was conveyed by a bill of sale under seal upon a stated consideration of \$860, no reference being made to the deed of the land or to the

agreement hereinafter mentioned. The deed and agreement are as follows:

Agreement.

"This agreement, made this 21st day of October, A. D. 1890, between Georgianna B. Knowlton and Robert J. Knowlton, of the county of Sherburne, and state of Minnesota, parties of the first part, and George W. Knowlton and Elizabeth A. Knowlton, his wife, of the same county and state, parties of the second part:

Witnesseth, that the said parties of the first part, in consideration of the agreement of the second party hereinafter contained, contracts and agrees with the said party of the second part as follows, to wit: That they, the said parties of the first part, will maintain and provide a home for the said parties of the second part in the dwelling now occupied by them on section 26, township 34, range 28, situate in Sherburne county, Minnesota; that they will provide suitable food and clothing, and maintenance in health and in sickness, will kindly and humanely furnish medical services and medicines, kind treatment, care, and services such as would be suitable to their age and circumstances during their natural lives. In consideration of the foregoing the said parties of the second part have this day made to the said parties of the first part a good and sufficient warranty deed of the northwest quarter of the southwest quarter of section 25, and the east half of the southeast quarter of section 26, in township 34, range 28, said deed to remain in full force and effect so long as this agreement shall be kept, and the provisions therein contained shall be faithfully observed. It is hereby agreed by the parties herein that the said party of the first part will not pay any debt contracted or that may be contracted by the said parties of the second part, and that the said first party shall not collect any debt due the said parties of the second part.

Georgianna B. Knowlton.  
Robert J. Knowlton."

Deed.

"This indenture, made this 21st day of October, in the year of our Lord one thousand eight hundred and ninety, between George W. Knowlton and Elizabeth A. Knowlton, his wife, of the county of Sherburne, and the state of Minnesota, parties of the first part, and Georgianna B. Knowlton and Robert J. Knowlton, of the county of Sherburne, and state of Minnesota, parties of the second part:

Witnesseth, that the said parties of the first part, in consideration of the sum of six hundred dollars, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do grant, bargain, sell, and convey to the said parties of the second part, their heirs and assigns, forever, all the following described pieces or parcels of land lying and being in the county of Sherburne, and state of Minnesota, described as follows, to-wit:



The northwest quarter of the southwest quarter of section twenty-five, township thirty-four, range twenty-eight, containing forty acres of land, more or less; and the east half of the southeast quarter of section twenty-six, township thirty-four, range twenty-eight, and containing eighty acres of land, more or less, according to the United States government survey thereof: Provided, that the said parties of the second part, or either of them, shall not incumber the above-described lands by mortgage or otherwise during the natural life of either of the parties of the first part without their consent. Provided, further, that if either of the parties of the second part shall cease to occupy, till, or farm the above-described lands, then the entire title shall revert to and become the property of the remaining party of the second part, and, should both of the said parties of the second part cease to occupy, till, or farm the said lands, then this deed to become null and void, and the said described lands revert back to the said parties of the first part.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto or in any wise appertaining, except as above provided. And the said George W. Knowlton and Elizabeth A. Knowlton, parties of the first part, do covenant with the said parties of the second part, their heirs and assigns, that they are lawfully seized of said premises in fee simple; that they have good right to sell and power to grant and convey the same; that the same are free from all incumbrances; that the said parties of the second part, their heirs and assigns, shall quietly enjoy and possess the same; and that the said parties of the first part will warrant and defend the title to the same against all lawful claims.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

George W. Knowlton. [Seal.]

E. A. Knowlton. [Seal.]

Signed, sealed, and delivered  
in presence of

Nellie L. Reed.

E. J. M. Knowlton."

The trial court found as a fact that at the time of the execution of these instruments the grantor George W. Knowlton was solvent, and executed the same in good faith, without intent to defraud his creditors, and that both the personal and real property were transferred for a good and valuable consideration. The deed is dated October 21, 1890, contains a stated consideration of \$600, but there are embodied in it stipulations and conditions as to occupancy and incumbrances which show upon the face of the instrument that it was not intended to be an absolute deed for the benefit of the

grantees. The agreement is dated the same day, is executed by the grantees mentioned in the deed, and contains a contract on their part to maintain and provide a home for the grantors of the deed in the dwelling occupied by the grantors upon the same premises conveyed by the deed. Again, it is expressly stated in the agreement that the consideration for its execution is the transfer of the land by the deed, and that the deed shall only remain in force and effect so long as the agreement shall be faithfully observed. Taking these two instruments together, it conclusively appears that each was the consideration of the other; hence this was *prima facie* a voluntary conveyance, and void as to creditors. *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831. See also for a discussion of the principle involved, *Wetherill v. Canney*, 62 Minn. 341, 64 N. W. 818.

This deed being *prima facie* void, the burden was upon defendants to prove a valuable consideration. This was attempted by the testimony of the daughter. She testified that the consideration for the deed was \$600 for services performed by her in the past, while from eighteen to twenty-two years of age, in taking care of her father's house and her mother. Upon this evidence the court found that at the time of the conveyance the father was indebted to the daughter in the sum of \$600 for services performed by her, and that the transfers were made in consideration thereof and the further consideration of the agreement of support. This finding was not warranted by the evidence. There is nothing in the record to indicate that there was a prior agreement or understanding between the father and daughter that she should be paid. She was a member of the family, and it must be presumed that she lived as such, and there is nothing to indicate that the service referred to was not performed voluntarily. Her claim, on this evidence, could not have been enforced against the estate. See cases cited under section 211, *Bump, Fraud. Conv.* (4th Ed.). It therefore follows that the findings of the court as to consideration for the deed to the land are not supported by the evidence, and that judgment must be reversed unless the judgment should be affirmed for reasons urged by the respondent.

It is claimed that under G. S. 1894, §§ 4506, 4507, the plaintiff can-

not maintain this action; that it is made the exclusive duty of the administrator; and, by not furnishing the security mentioned, plaintiff is without a remedy. This is not the effect of the statute. The interpretation is plain. An administrator or executor may bring such actions, but is not bound to, unless furnished security. But this is not exclusive of the right of creditors to proceed independently.

The statute of limitations does not operate to cut off plaintiff's claim. It was presented in the probate court, and allowed as a valid debt against the estate. The allowance of a claim, if not appealed from, has all the binding effect of a judgment. *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684, and cases cited.

Judgment reversed, and new trial granted.

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H. J. BLOEMENDAL and Others v. H. C. ALBRECHT.

April 27, 1900.

Nos. 12,015—(110).

**G. S. 1894, § 5854—Occupant May Remove Crops Sown.**

Under G. S. 1894, § 5854, the owners of crops which they have sown upon lands occupied by them may enter upon the premises for the purpose of removing the crops after entry of judgment against them in ejectment, although such owners were adjudged to be not entitled to possession of the land when the crops were sown.

Action commenced before a justice of the peace in Renville county to recover \$90, and interest, damages for conversion of crops. From a judgment in favor of plaintiffs, defendant appealed to the district court for that county, and the action was removed to the district court for Sibley county, where it was tried before Cadwell, J., and a jury, which rendered a verdict in favor of plaintiffs for \$94.40. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*Ed. H. Huebner*, for appellant.

*J. M. Freeman*, for respondents.

LEWIS, J.

Plaintiffs Bloemendal were in possession of certain premises in the spring of 1898, then and for many years having resided thereon. On May 5 of that year they rented a part of the premises to plaintiff Quade, who planted a crop thereon. At the trial it was stipulated that on October 16, 1898, a writ of restitution had issued out of the district court of Renville county upon a judgment in an action wherein defendant, Albrecht, was plaintiff, and plaintiffs Bloemendal were defendants, which judgment had decreed Albrecht to have been the owner of and entitled to the possession of the premises since April 1, 1893; that on October 18, 1898, the Bloemendals were ejected from the premises by the sheriff of the county under the writ. After the ejectment plaintiff Quade, who was a renter, attempted to enter upon the premises for the purpose of removing a part of the crop which he had raised during the season, but was prevented from so doing by defendant. The plaintiffs were owners in common of the crop so raised, and bring this action to recover the value of grain taken possession of by defendant. Plaintiffs had a verdict, and defendant appeals from an order denying a new trial.

1. The first assignment of error calls in question the sufficiency of the complaint. Granting that the complaint was defective in the first instance, under *First Nat. Bank of Anoka v. St. Croix Boom Corp.*, 41 Minn. 141, 42 N. W. 861, the amendment allowed by the court cured it by substituting for the special allegations a general allegation of ownership in the plaintiffs.

2. The other assignments go to one question only, and may be considered together. Defendant relies upon the proposition that, because it was proven that he was the owner of, and entitled to the possession of, the premises on April 1, 1893, before the crops were sown, he was continually the owner of the crops, although plaintiffs were not ejected until after the crops matured.

"The occupant, in case of ejection, shall be entitled to enter the land, and gather and remove all crops sown thereon previous to the entry of judgment against him." G. S. 1894, § 5854.

Under the stipulation, the decree and writ of restitution must

be considered as being founded in an action of ejectment. Under the evidence, the plaintiffs were occupants, within the meaning of this section, and as such were entitled to enter upon the land after the entry of judgment, and after ejection, for the purpose of removing all crops sown thereon prior to the entry of the judgment. It is immaterial that defendant's title and right of possession antedated the sowing of the crops. There is no evidence to show that plaintiffs were trespassers. The Bloemendals had been in possession and residing upon the land for years, and were holding over, and it must be assumed that the rights of the parties were litigated in the action culminating in the judgment.

Order affirmed.

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MINNIE S. GRIBBLE v. JOHN WAGENER.

April 27, 1900.

Nos. 12,058—(57).

**Payment by Sheriff—Order of Court—Findings not Sustained by Evidence.**

*Held*, that the findings of fact by the trial court are not sustained by the evidence.

Action in the municipal court of St. Paul to recover from defendant sheriff of Ramsey county the sum of \$132.92, collected by him, with interest. The case was tried before Orr, J., who found in favor of plaintiff for the amount demanded. From a judgment entered pursuant to the findings, defendant appealed. Reversed.

*C. D. & Thos. D. O'Brien*, for appellant.

*Edwin Gribble*, for respondent.

START, C. J.

This was an action in the municipal court of the city of St. Paul to recover from the defendant \$132.92, the residue of money collected by him as sheriff of Ramsey county on an execution issued on a judgment in favor of the plaintiff. The defense was that, in an action or proceeding in the district court for the county of Ram-

sey to which the plaintiff, L. S. Cotton, and the defendant were parties, and in which Mr. Cotton claimed the \$132.92, the court adjudged and ordered the money to be paid over to Mr. Cotton, the claimant, and that the defendant did accordingly pay it to him. The trial court found that no such order was made by the district court, and that no judgment was entered in such proceedings, and ordered judgment for the plaintiff for the amount demanded. The defendant made a motion for a new trial, which was denied, and judgment was entered on the findings, from which the defendant appealed.

The only question presented by the record for review is whether the decision of the trial court was justified by the evidence. There was no substantial conflict in the evidence, and the real question is whether the undisputed evidence required a finding that the money was paid by the sheriff to Mr. Cotton pursuant to the decision or order of the district court. That the sheriff did in good faith pay the money to Mr. Cotton is not controverted; but did the court so order? is the question. Ordinarily, such a question would be conclusively answered by a reference to the records of the court, but at the time of the trial the pleadings and the alleged order or decision in the former action were missing from the files of the court, and could not be found. Such records, however, show that the district court on April 3, 1897, by consent of the parties, directed that the claimant, Mr. Cotton, and the plaintiff herein should interplead touching the former's right to the money so in the hands of the sheriff; that the claimant forthwith file a complaint setting forth the grounds of his claim, and that the plaintiff answer in three days; that the claimant have three days thereafter in which to reply; and that the issues so found stand for trial by the court. The entries in the register of civil actions show that the complaint, answer, and reply were accordingly filed; cause tried April 20, 1897; decision filed June 15 thereafter; and proceedings stayed twenty days. Other than this, the records are silent. There was no evidence either that a formal judgment had been entered or that the action had been dismissed.

The oral evidence is practically conclusive that the decision of the court was in favor of the claimant, and was to the effect that

he was entitled to the money, and that it was paid over to him by the defendant some time in July, 1897, and that no further claim was made on him for the money until some sixteen months thereafter. The oral evidence as to the contents of the decision or order in question was substantially this: The attorney for Mr. Cotton testified that he had seen and read the decision, and it was to the effect that Mr. Cotton was entitled to the money, and that the sheriff pay it over to him. The testimony of the judge of the district court who made the decision was to the effect that his recollection was not clear as to the terms of the decision, but that he felt confident it was in the form of findings of fact and conclusions of law, in which he found that Mr. Cotton was entitled to the money, and directed judgment accordingly. The father of the plaintiff, who is her attorney in this action, who had seen and read the decision, testified as follows:

“Q. You may state whether or not that decision was an order for judgment. A. The decision was an ordinary sort of decision. The court found his findings of fact and conclusions of law, and said, ‘Let judgment be entered accordingly.’ There was no order in it.”

The most favorable conclusion for the plaintiff that it is possible to draw from the evidence in this case is that the decision of the district court was in the form of findings of fact and conclusions of law containing an order for judgment for the claimant to the effect that he was entitled to the money, and that the sheriff pay it to him. The fact that the sheriff complied with the order before the judgment was entered affords no ethical or legal reason why he should be compelled to pay the money a second time, unless the decision or order of the court is first set aside. This has not been done. The decision was, in legal effect, an order for the payment of the money to the claimant, and, if the formal entry of a judgment was necessary, it was, at most, only an irregularity for the sheriff to comply with the order before the judgment was entered. By so doing he assumed the risk of the order being set aside by the district court or reversed on appeal. But until that contingency occurs the plaintiff cannot maintain this action.

Judgment reversed, and a new trial granted.

ADAM GILLES v. J. H. MAHONY and Another.

April 27, 1900.

Nos. 12,078—(200).

**Statute of Frauds—Oral Agreement of Wife to Pay Husband's Note.**

An agreement to forbear suit against the original debtor at the request of a third person to answer for the debt is a collateral promise, and is within the statute of frauds, and void, unless in writing.

Action in the district court for Hennepin county to recover \$1,200 and interest on a promissory note executed by defendant J. H. Mahony, which, as the complaint alleged, defendant Sarah Mahony had agreed to pay. The case came on for trial of the issues raised by the separate answer of Sarah Mahony before Harrison, J., who directed a dismissal of the action. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*Penney & McMillan*, for appellant.

*Woods, Kingman & Wallace*, for respondent.

LEWIS, J.

Plaintiff brings this action against J. H. Mahony to recover the amount due upon a certain promissory note maturing April 4, 1896, and joins his wife, Sarah Mahony, as defendant, seeking to hold her upon an alleged contract on her part to pay the note. The complaint states that on or about May 4, 1895, the wife, in consideration of plaintiff's promise not to enforce the collection from said defendant J. H. Mahony of the interest then due on the note, promised to pay the note and interest at or before the maturity of the same, and that plaintiff did so promise, and did so refrain from enforcing collection against J. H. Mahony. Again, the complaint alleges that on March 10, 1896, the wife made the same promise, in writing, in consideration of the same promise to refrain from proceeding against the husband.

At the trial plaintiff offered no evidence of any agreement in writing on the part of the wife, but undertook to prove the agreement or promise by the oral testimony of the plaintiff as to what she had said on the subject. This testimony was objected to, upon



the ground that it was within the statute of frauds, being a collateral promise to pay the debt of another. The objection was sustained, whereupon her counsel asked leave to amend the complaint by alleging that, prior to such alleged promise to pay the note, she had entered into a business transaction with her husband, whereby and for a consideration she assumed and agreed to pay the note. This request to amend was denied, and the ruling is not assigned as error. Thereupon plaintiff made an offer to prove an oral agreement on the part of the wife to pay the note and interest, as follows:

"If you don't ask my husband for this interest at any time, or bother him in any way about it, or the note, or sue him or make him any trouble in any way about it, I will pay this note when it comes due, and I will pay the interest on it." That plaintiff, in reply to her offer, stated, "Very well, I will take you, then, in your husband's place. I will look to you for the payment of this note and the interest when it becomes due."

Further offers were made to prove that plaintiff carried out his agreement, and did not seek to enforce collection against the husband; that the wife had received certain property from the husband just prior to the alleged agreement; and that since the maturity of the note the husband had not been within the jurisdiction of the court, and had no property therein. The offer was objected to and sustained, and the rulings of the court are assigned as error.

As the complaint stood, there was nothing to show that the wife had any interest in the payment of the note; that she would be benefited thereby; that she had assumed the debt; or that plaintiff agreed to discharge the husband. The agreement alleged is a collateral promise on her part to assume the debt, and is within the statute of frauds. *Gump v. Halberstadt*, 15 Ore. 356, 15 Pac. 467; *Ames v. Foster*, 106 Mass. 400; *Gill v. Herrick*, 111 Mass. 501; *Ruppe v. Peterson*, 67 Mich. 437, 35 N. W. 82; *Hooker v. Russell*, 67 Wis. 257, 30 N. W. 358; *Ackley v. Parmenter*, 98 N. Y. 425; *Mitchell v. Miller*, 25 Misc. (N. Y.) 179, 54 N. Y. Supp. 180.

Order affirmed.

**HENRY HARM v. N. T. DAVIES and Another.**

April 27, 1900.

Nos. 12,109—(42).

**Pleading—Defense to Action upon Note.**

In justice court the answer was held insufficient on objection of plaintiff. Exception by defendants, and appeal on questions of law. *Held*, that the answer stated a defense, and that the justice erred in sustaining the objection.

**Justice of the Peace—Joint Appeal to District Court—G. S. 1894, § 5068.**

The execution and filing of an affidavit by each defendant who attempts to appeal is required by G. S. 1894, § 5068, where defendants are jointly liable, and judgment rendered against them jointly.

Action before a justice of the peace to recover \$49.25 and interest on a promissory note. From a judgment in favor of plaintiff, defendants appealed on questions of law to the district court for Freeborn county, where the case was heard before Kingsley, J., who made an order of affirmance. From a judgment entered pursuant to the order, defendants appealed. Reversed with directions.

*J. A. Sawyer*, for appellants.

*Henry A. Morgan*, for respondent.

**LEWIS, J.**

Action in justice court upon a promissory note executed by defendants to one Schleuder, and transferred to plaintiff. When the case was called for trial, complaint and answer were filed, and plaintiff objected to certain parts of the answer that it did not contain a defense, and moved that such parts be stricken out. Objection of plaintiff sustained. Exception by defendants. Defendants then appeared and filed an amended answer, to which plaintiff objected as insufficient. Objection sustained. Exception by defendants. Plaintiff then submitted testimony, and defendants offered no evidence. Judgment rendered against the defendants for the amount claimed. Defendant N. T. Davies filed an affidavit of appeal to the district court as to himself, but containing no reference to defendant F. L. Davies. Both defendants joined in the execu-

tion of an appeal bond, in the body of which both defendants are described as having appealed. The notice of appeal was signed by defendant N. T. Davies only, but in the body of the instrument both defendants are declared as appealing. The appeal was taken on questions of law alone. In the district court the judgment was affirmed. Both defendants appeal to this court from the judgment of the district court.

1. We are required to determine whether the justice erred in sustaining plaintiff's objection to the sufficiency of defendants' amended answer. That part of the answer referred to is as follows:

"Further answering, and as an affirmative defense herein, defendants allege that at the time of the execution and delivery of said note these defendants delivered to the payee therein named, as collateral security therefor, a certain promissory note, bearing date on the 1st day of October, 1895, for the principal sum of \$81.76, with interest, made and delivered by one Orlo Baker to the defendant N. T. Davies, which said note was then the property of these defendants, and by its terms due and payable on the first day of February, 1897, together with a chattel mortgage of even date, executed and delivered by said Baker, securing the payment of said note, which said note and chattel mortgage were subsequent thereto, without the knowledge or consent of these defendants or either of them, extended for the full term of sixty days after the said day of the maturity thereof by said payee, Schleuder, and by this plaintiff, to defendant's damage in the sum of \$91.32."

Although the statement of facts constituting the damages claimed is exceedingly brief, and not at all satisfactory as a foundation for the introduction of evidence, yet the allegation that the note was extended by the plaintiff and Schleuder, to defendant's damage, will be considered sufficient, in view of the liberality allowed in the construction of pleadings in the justice court. Therefore the amended answer contained a defense, and the justice erred in sustaining the objection to it.

2. No affidavit in appeal was filed by or on behalf of defendant F. L. Davies. The affidavit is jurisdictional, and without it the case was never appealed as to defendant F. L. Davies. *McFarland v. Butler*, 11 Minn. 42 (72). The affidavit filed by the other defendant did not operate as an affidavit for his codefendant, in the absence

of anything to show that he was acting as his agent. Neither does the fact that both are described as appellants in the bond and notice cure the defect. Each separate and distinct act required by the statute (G. S. 1894, § 5068) must be complied with by each appellant. It follows that the district court acquired no jurisdiction of defendant F. L. Davies.

The judgment is reversed, with directions to the district court to dismiss the appeal of defendant F. L. Davies, and to reverse the judgment as to defendant N. T. Davies.

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JAMES B. FITZGERALD v. WILLIAM H. KING.

April 27, 1900.

Nos. 12,122—(138).

**Action for Goods Sold—Evidence of Payment.**

Evidence examined, and found to sustain the decision.

Action in the municipal court of St. Paul against defendant, as surviving partner of a firm composed of one Isaac Staples and himself, to recover \$98 for goods sold and delivered. The case was tried before Hine, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*Palmer & Beek and J. A. Larimore, for appellant.*

*J. P. Kyle, for respondent.*

LEWIS, J.

The complaint in this action alleges that between November 13, 1895, and June 1, 1898, plaintiff, at the special instance and request of a firm of which defendant was surviving partner, sold and delivered to them certain goods of the reasonable worth and value of \$98, which sum they agreed to pay. The answer admitted that between said dates the plaintiff sold and delivered to the firm certain goods, chattels, wares, and merchandise, of the reasonable value of \$98, but alleged payment. The cause was tried by the court below without a jury, who rendered a decision in favor of the

plaintiff for the amount claimed. Defendant appeals from an order denying a motion for a new trial, and assigns as error that the decision is not justified by the evidence.

At the trial plaintiff testified that the goods had not been paid for, and rested; his counsel and the court taking the position that the sale of the goods was admitted by the answer. Defendant then introduced two checks, which had been executed by the firm and delivered to plaintiff within the dates mentioned in the complaint, one for \$72.50 and one for \$113.06, and substantially no other evidence in his favor, and now asks this court to reverse the order of the trial court, upon the ground that it must be presumed that between the dates mentioned in the complaint the plaintiff sold the firm no other goods than those sued for, and hence it must be presumed that the checks were given in payment of those goods. This logic might be good if there was anything in the record to support it, and if a few things were lacking which appear in the record, viz.: Plaintiff testified that the goods had not been paid for; the two checks amount to \$185.56, and the amount claimed is \$98; the defendant did not offer the books of the firm to prove the goods had been paid for, although the books were in court, and an attempt made to prove, by oral testimony, that a balance had been struck. The appeal is without merit.

Order affirmed.

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GAD M. DWELLE v. PATRICK H. RAHILLY.

April 27, 1900.

Nos. 12,123—(24).

**Appeal—Evidence of Payment of Note.**

Action in the district court for Wabasha county by plaintiff, as receiver of Merchants Bank of Lake City, to recover a balance of \$236, and interest, on a promissory note made by defendant to the order of the bank. The case was tried before Snow, J., and a jury, which rendered a verdict in favor of plaintiff for \$304.05. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*Henry W. Morgan*, for appellant.

*Allen J. Greer and Wesley Kinney*, for respondent.

PER CURIAM.

Action to recover a balance of \$236, alleged to be due on a promissory note. Defense that \$200 of this amount had been paid. The trial resulted in a verdict by the jury for the full amount. From an order denying a motion for a new trial, defendant appeals.

It is necessary to mention one only of the errors assigned, viz., is the evidence insufficient to support the verdict, and did the court, for that reason, err in refusing to grant a new trial? Defendant insists that the direct statement as to the payment of the \$200 was not met by any positive evidence on part of the plaintiff. The court properly submitted the question to the jury. The evidence is not clearly and palpably against the verdict, and therefore, within the rule long established by the decisions of this state, the order must be affirmed.

Order affirmed.

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N. T. DAVIES and Another v. T. V. KNATVOLD.

May 1, 1900.

Nos. 12,045—(29).

**Decision Supported by Findings of Fact.**

Appeal by plaintiffs from a judgment of the district court for Freeborn county in favor of defendant, entered in accordance with the findings and order of Whytock, J. Affirmed.

*J. A. Sawyer*, for appellants.

*H. H. Dunn*, for respondent.

PER CURIAM.<sup>1</sup>

This is an appeal from a judgment of the district court of Freeborn county entered after trial by the court without a jury. There is no settled case, and nothing in the record properly to identify the deed, which appellants urged the court to consider, as being

<sup>1</sup> LOVELY, J., having been of counsel, took no part.

the deed offered in evidence on the trial of the case. The findings of the trial court are returned here, and the only question to determine is whether the findings of fact support and justify the conclusions of law. That they do is apparent from the first reading, and we have no alternative but to affirm the judgment appealed from.

Judgment affirmed.

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SEYMOUR VAN SANTVOORD and Another v. ARTHUR P. SMITH  
and Another.

May 2, 1900.

Nos. 12,000—(99).

#### **Modification of Contract by Parol.**

A contract not under seal, and containing no restrictions against it, may be changed and modified by a subsequent parol agreement.

#### **General Contracting Agent—Powers.**

A general contracting agent, having a general supervision of his principal's business in a particular territory, whose authority with respect thereto is not limited or restricted, may consent to a change and modification of a contract made by him with a third person, if such change or modification be in the line of the principal's business.

#### **Instructions to Agent—Notice to Third Person.**

Instructions to such an agent by the principal, "not to make parol contracts with agents," not having been brought to the notice of the person with whom the agent contracts, are not effectual as to such person.

Action in the district court for Pipestone county by plaintiffs, as receivers of the Walter A. Wood Mowing & Reaping Machine Company, to recover \$225 and interest on an alleged guaranty of payment of certain promissory notes. The case was tried before P. E. Brown, J., and a jury, which rendered a verdict in favor of defendants. From an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

*Evans & Evans* and *Ashley Coffman*, for appellants.

Defendants attempt to establish the validity of the oral contract

by stating that Andrus was the general agent of the company, but whether he was a general or special agent is a conclusion of law to be established by facts and not by the naked statement of a witness. *Comfort v. Sprague*, 31 Minn. 405; *Knight v. Luce*, 116 Mass. 586; *Roberts v. Pepple*, 55 Mich. 367; *Thayer v. City*, 19 Pick. 511, 516; 1 Am. & Eng. Enc. (2d Ed.) 99, 995; *Deane v. Everett*, 90 Iowa, 242. The alleged contract, as changed and modified by the agent, was in direct violation of his written authority and therefore invalid. *Carey v. German*, 84 Wis. 80; *Knudson v. Hekla*, 75 Wis. 198; *Hankins v. Rockford*, 70 Wis. 1; *Plano v. Root*, 3 N. D. 165; *Gardner v. Fidelity Mut. L. Assn.*, 67 Minn. 207; *Cleaver v. Traders*, 65 Mich. 527; *Halverson v. Chicago, M. & St. P. R. Co.*, 57 Minn. 142; *Sencerbox v. McGrade*, 6 Minn. 334 (484).

*F. L. Janes*, for respondents.

A claim that the parties could make this contract and then could not, as between themselves, unmake or change it would involve a legal absurdity. It is probably true that they might prescribe how the change should be made, but when no method is prescribed in the contract, then it may be changed orally. *Esterly v. Bemis*, 93 Iowa, 398. Andrus had authority to modify or change the contract. 1 *Morawetz, Priv. Corp.* § 56; 1 Am. & Eng. Enc. 350. If the agent's instructions are in writing, the question of authority is one for the court; if oral, for the jury. If there is any evidence tending to prove the authority of the agent, the act cannot be excluded from the jury. *Thayer v. City*, 19 Pick. 511; 1 *Thompson, Trials*, § 1370; *D. M. Osborne v. Stringham*, 4 S. D. 593. See also *Wheeler v. Benton*, 67 Minn. 293.

BROWN, J.

Appeal by plaintiffs from an order denying a new trial after verdict for defendants. The action is one to recover upon an alleged guaranty of the payment of certain promissory notes taken by defendants on the sale of machinery, as agents of the Walter A. Wood Mowing & Reaping Machine Company, a corporation, of which plaintiffs are receivers. The facts are as follows: During the year 1892, the Walter A. Wood Mowing & Reaping Machine Company was, and since has continued to be, a corporation, en-



gaged in the manufacture and sale of farm machinery, having its place of business and principal office in the state of New York. On February 15, 1892, the defendants, as copartners, entered into a certain written contract with said corporation, by the terms of which said defendants were constituted and appointed agents for the sale of its machinery at Jasper, this state. Said contract contains, among other conditions and agreements, the following:

"Second. To make sales only to parties of well-known responsibility, \* \* \* and to require that all notes shall bear true statements of the real and personal property of the makers, filled out and signed by them. \* \* \*"

And also the following provision: "Fourth. Said second party hereby guaranties payment of, and agrees to indorse, all notes and renewals of notes (except such as bear property statement, as required by article second herein), in the following form, to wit: 'For value received, I hereby guaranty the payment of this note, and any renewal of same, and hereby waive demand, protest, and nonpayment.' Failure by said second party to indorse notes not bearing property statement, as herein provided for, shall not affect the above guaranty of payment."

In July, 1892, said defendants, as such agents, sold and delivered one of the machines furnished them by said corporation to one W. C. Storts, taking in payment therefor two promissory notes, payable to the corporation, each for the sum of \$67.50. Defendants did not procure from Storts a property statement, as required by the terms of the contract. Storts failed to pay the notes, and this action is brought upon defendants' contract of guaranty, above set out.

There is no controversy about these facts. Defendants admit them. Their defense to the action is that, subsequent to the date of entering into the contract with the company, they found that it would be impossible to obtain from purchasers of machines the required property statement, which fact they communicated to the general contracting agent of the company, E. F. Andrus, with whom they made their contract, and that, by the mutual consent of the parties, the contract was changed and modified by relieving defendants of the obligation and duty of procuring the same, and from their agreement to guaranty the payment of all notes not accompanied with such statement. And they claim that the ma-

chine was sold to Storts by them, acting under the modified contract. The agreement to change and modify the contract was made, if at all, on the part of the company by its said agent, E. F. Andrus. Plaintiffs deny that the agreement was modified or changed in any respect; and they contend, further, that Andrus had no authority to change or modify it, if it be found that he did so as a matter of fact. There are but two questions in the case, as we view it: First, was it competent for the parties to change and modify the contract in the respect mentioned by a parol agreement; and, second, had Andrus authority to so act?

The contention of appellants is that no modification of the contract could be made by the parties except in writing, and that, in any event, Andrus had no authority to make such a change as is claimed by defendants to have been made. The contract is an ordinary contract of agency,—a simple contract, not under seal,—and it was competent for the parties to modify or change it by parol, unless the terms thereof expressly forbid such a change. It is claimed by appellants that the contract does forbid it, and this contention is true with respect to two subjects at least. The provision of the contract relied upon by appellants in this connection is as follows:

“It is understood and agreed that no verbal agreement or understanding with any contracting or other agent for the first party, under which the said second party may seek to make an outright purchase of machines or other property, instead of selling same upon commission, as provided for in this agreement, will be of any force or effect whatever, unless submitted to, or approved in writing by, the first party, through the manager of its Minneapolis office. And it is further understood and agreed that no claims for concessions of any kind shall be allowed said second party by said first party, except on written authority from said first party or its regular traveling agent.”

This cannot be given the broad construction claimed for it by counsel for appellants. It refers to two subjects only, and cannot be extended to make it apply to others. It simply provides that no verbal change in the contract by which the defendants might seek to become purchasers of machines in their possession for sale, instead of selling them on commission, shall be made without ap-

proval by the company's manager at Minneapolis; and, further, that no claims for concessions of any kind shall be allowed to defendants except on written authority from the company or its regular traveling agent. Neither of these provisions can be construed as having any reference to the subject-matter here in dispute. The contract contains no other restrictions on the right of the parties to change or modify the same at their pleasure. In fact, it clearly contemplates other modifications. It provides that defendants shall abide by and carry out all instructions pertaining to prices, terms of sale, and the conduct of the agency which the company may thereafter give, and such instructions are expressly declared to be a part of the contract. There being no restrictions against it, it was clearly competent for the parties to modify the contract.

The verdict of the jury establishes the fact that it was modified in the respect claimed by defendants, and, it being competent for the parties to so agree, we have only to determine the further question whether the change and modification were within the scope of the authority of Andrus.

That it was there can be no serious doubt. The evidence establishes the fact that Andrus was the "general contracting and traveling agent" of the company; that he had twelve counties under his charge, in which were located twenty-five agencies, and had a general supervision of the business of the company in those counties. He transacted all the company's business with defendants, and made the original contract with them. It is very true that the power and authority of a general agent may be circumscribed and restricted within certain limits; that limitations may be imposed by the principal, beyond which the agent may not go and bind his principal; but no restrictions on the authority of Andrus, covering the subject in controversy, were shown. There was no attempt to dispute or controvert the evidence of defendants that he was the general contracting and traveling agent of the company. On the contrary, plaintiffs' evidence tended to corroborate the defendants' contention in that respect. Neither does plaintiffs' evidence show that Andrus was in any way prohibited from making changes in contracts made by him with agents under his charge, except in the two respects heretofore pointed out. There is no evidence that the

subject or character of the modification here involved was beyond his authority or instructions, and, having been made in the line of his duties and in the interests of his principal's business, it must be assumed, from the nature of the agency, that he was authorized to make the same. *Tice v. Russell*, 43 Minn. 66, 44 N. W. 886; *Badger v. Ballentine*, 54 Mo. App. 172; *Burley v. Hitt*, Id. 272; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. 590; *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R.*, 120 U. S. 256, 7 Sup. Ct. 542.

If the contract as originally made carried on its face, as contended by counsel for plaintiffs, notice to defendants that Andrus had no authority to agree to a change or modification of the contract of the nature and effect of this one, we would concur in their contention that the modified contract would not be binding on the principal, and could not be enforced except by showing a ratification. But such notice was not conveyed by the original contract, nor does the evidence show any prohibition or restriction upon the right of the agent to make changes and modifications in the contract with respect to the subject under consideration. The evidence relied upon to show want of authority is found in the testimony of the agent himself, which is to the effect that he was instructed "not to make oral contracts with agents." These instructions were not communicated to defendants by the original contract or otherwise, and they are not bound thereby. *Markey v. Mutual*, 103 Mass. 78. The principal may impose upon the authority of his agent "as many limitations and restrictions as he thinks best, and these limitations and restrictions are binding upon third persons, if they have notice of them, or might with reasonable diligence have ascertained them." *Mechem*, Ag. § 708. As before stated, these instructions were not communicated to defendants, and they were not affected thereby. The provision of the original contract, requiring its approval by the company's Minneapolis manager, can have no controlling effect, inasmuch as the contract clearly contemplates subsequent changes, and such subsequent changes are not required to be so approved.

We have considered all of appellants' assignments of error, and find no reason for disturbing the verdict of the jury.

Order affirmed.

70 M.—21

## FIRST NATIONAL BANK OF MANKATO v. E. F. BUCHAN.

May 2, 1900.

Nos. 12,007—(75).

**Accommodation Paper Used as Collateral Security—Notice to Pledgee.**

One Day was indebted to plaintiff in the sum of \$3,500. To secure the payment thereof, he delivered to it, as collateral security, a promissory note of defendant in the sum of \$500. Said note was made and delivered by defendant to Day without consideration, as an accommodation to him, and for the purpose of being used as such collateral security. The plaintiff received such note in good faith, and without notice that it was an accommodation note. *Held* that, if plaintiff subsequently received notice that the note was accommodation paper, it could not thereafter become a purchaser thereof, and enforce the same against defendant, to any greater extent than it could have done had it continued to hold it as collateral security.

**Same—Purchase by Pledgee.**

If the plaintiff became such purchaser after it received notice of the character of the note, it can recover thereon no greater sum than remained due on the secured indebtedness at the time of such purchase.

Action in the district court for Nobles county to recover \$500 and interest on a promissory note. The case was tried before P. E. Brown, J., and a jury, which rendered a verdict in favor of plaintiff for \$705.54. From an order granting a motion for a new trial, plaintiff appealed. *Affirmed.*

*L. F. Lammers and Geo. W. Wilson & Son*, for appellant.

Plaintiff has never parted with possession nor changed his position as to ownership, or claim of title, under a different right from that under which the note was taken in the first instance, and is a bona fide owner. *Valley v. Jackaway*, 80 Iowa, 512. The pledgee of negotiable instruments, properly indorsed and delivered, receiving the same before maturity in good faith and without notice of equities as collateral security for a valid antecedent debt, without more, is a holder for value in the usual course of business. *Colebrooke*, Col. Sec. § 20; *Railroad Co. v. National Bank*, 102 U. S. 14, 28; *Bank v. Vanderhorst*, 32 N. Y. 553. Accommodation paper is

a loan of the maker's credit without restriction as to manner of use, and the maker cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely. *Lord v. Ocean*, 20 Pa. St. 384. One who receives an accommodation note as collateral security for an antecedent debt, without other consideration, is holder for value within the rule of protection against antecedent equities. *Maitland v. Citizens*, 40 Md. 540; *Grocers v. Penfield*, 69 N. Y. 502.

One who makes or indorses a note to be used in a particular way takes a risk of it being used in another way or for another purpose, and is answerable thereon to any bona fide holder into whose hands it may come. *Sweetser v. French*, 2 Cush. (Mass.) 309; *Fearing v. Clark*, 16 Gray, 74; *Merchants v. Comstock*, 55 N. Y. 24; *Park v. Watson*, 42 N. Y. 490; 1 *Daniel*, Neg. Inst. §§ 824, 827, 832; *Mayer v. Heidelberg*, 123 N. Y. 332. Where the pre-existing debt is actually and absolutely extinguished in consideration of the negotiable paper transferred, the transferee is protected against prior equities. *Railroad Co. v. National Bank*, supra; 1 *Daniel*, Neg. Inst. §§ 831, 832. Even though there were a diversion from the original purpose for which the note was intended, by the taking of renewal notes, plaintiff would still be protected as a bona fide holder from the fact that it never received notice of the character of the transaction between Day and Buchan until after such renewals. See *Colebrooke*, Col. Sec. §§ 27-36; *Spencer v. Ballou*, 18 N. Y. 327; *Park v. Watson*, supra. Plaintiff was not bound to make inquiries, and mere negligence, however gross, not amounting to wilful and fraudulent blindness, while it may be evidence of mala fides, is not the same thing. *Goodman v. Harvey*, 4 Ad. & E. 870; *Uther v. Rich*, 10 Ad. & E. 784; *Commercial v. First National*, 30 Md. 11; *Thatcher v. West River*, 19 Mich. 196, 202.

*Daniel Rohrer*, for respondent.

BROWN, J.

This is an action to recover upon a promissory note. Plaintiff had a verdict in the court below, which was set aside on defendant's motion, and plaintiff appeals from the order.

The facts are briefly as follows: One Day was doing business at

Worthington, this state, as a banker, under the name of "Farmers' & Citizens' Bank." He became indebted to the plaintiff in the sum of \$3,500, which was about to mature, and to secure an extension of the time of payment thereof Day procured from defendant the note upon which this action is brought, and turned it over to said plaintiff as collateral security. The note in suit was given to Day by defendant wholly without consideration, and as an accommodation to said Day, for the purpose of being used to obtain the said extension. Plaintiff received and accepted the note without notice of the fact that it was an accommodation note, and extended the time of the payment of the Day note. Subsequent to this transaction, Day became further indebted to plaintiff, the total amount of which was something like \$8,000 on June 1, 1898, and had delivered to it other notes as security for its payment. On the day just named the parties entered into an agreement, by the terms of which Day transferred to plaintiff certain real estate, and relinquished all claims to the collaterals held by plaintiff, including the note in suit, and in fact transferred the title to such collaterals to plaintiff, in consideration of the surrender to Day of all obligations held against him by plaintiff. Plaintiff's ownership of the note in suit is based on this agreement and transfer.

1. There is evidence in the case tending to show that, prior to this transaction, plaintiff was notified and became aware of the character of the note in suit, and that it was given without consideration, and was accommodation paper. In the view we take of the case, the question whether the plaintiff knew, at the time of making the contract and agreement by which it became the owner of the note in suit, that such note was an accommodation note, is of controlling importance. If, at the time such agreement was made, the plaintiff had notice of the fact that the note was accommodation paper, it had no right to change its relation thereto, or to make any new contract with Day with reference to it, which would in any way injuriously affect the interests or rights of defendant. It could not, after having acquired such notice, by any new contract or agreement with Day place defendant in any worse position than he was in before. And the plaintiff cannot, if it had such notice, enforce the note against defendant under the new agreement to

any greater extent than it could have done had it continued to hold it as collateral security. If the plaintiff had no such notice at the time of the final settlement with Day, then it may recover the full face of the note, with interest. Therefore whether plaintiff had such notice is of prime importance with respect to the question what, if anything, the plaintiff is entitled to recover. The evidence on this subject made a case for the jury, and it should have been submitted to them. The court below was right in granting a new trial.

2. The same rule must also apply to defendant's counterclaim, so far as applicable to the facts. And, in view of another trial of the action, we may say, further, with reference to such counterclaim, that, if defendant's right to a return of the \$1,100 note and mortgage has accrued, because they have fulfilled the office for which they were delivered to plaintiff, or for any other reason, and plaintiff has wrongfully refused to return them knowing that defendant is the real owner thereof, defendant would be entitled to recover their value as damages. If plaintiff still has the right to hold and retain them, either by virtue of the contract under which they were originally delivered to it, or because it became a good-faith purchaser thereof under the contract made with Day on June 1, defendant cannot recover upon his counterclaim, because, if such be the fact, the note and mortgage do not belong to him. We may also say that, under the evidence shown in the record, defendant is not entitled to recover upon his counterclaim. It does not appear, even conceding that he is entitled to a return of the note and mortgage, that he has been in any way damaged by the failure of plaintiff to take proceedings looking to their collection, and, as we understand it, the plaintiff's alleged failure in this respect is the basis of his asserted right to damages. It does not appear that the mortgaged property is insufficient to pay the mortgage debt. Further comment on the evidence or questions likely to arise on another trial of the case is unnecessary.

With this brief statement of the rules which we think must con-



trol the issues and final result, we return the cause to the court below for another trial.

Order affirmed.

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CHARLES C. GILBERT v. MICHAEL HEWETSON and Another.

May 2, 1900.

Nos. 12,038—(144).

### **Traffic in Trust Property.**

The principle of equity jurisprudence, that a person occupying a fiduciary relation with respect to the business of another will not be permitted to deal or traffic with the trust property in his own interests, applied.

### **Foreign Receiver—Title to Choses in Action.**

A receiver of the property of a resident of the state of Illinois, appointed in a creditors' suit pending in that state, to whom all the property of the debtor, real, personal, and mixed, is transferred by order of the court, acquires thereby title, and the right to recover upon a debt due to the debtor from a resident of the state of Wisconsin. The situs of such debt is at the domicile of the creditor.

### **Purchase by Confidential Clerk of Receiver.**

Defendant, Hewetson, was a trusted clerk and confidential adviser of plaintiff, who was a duly-appointed and acting receiver of the property of one Frederiksen, and as such clerk had general charge of the affairs of the receivership. He thereby obtained knowledge and information concerning certain property belonging to the trust estate, and wrongfully, with the assistance of others, collected, and invested \$3,000 thereof in lands within this state, in his own name and for his own use and benefit. *Held*, that the land should be impressed and charged with a trust in favor of the receiver to the extent of such sum of money, with interest.

### **Statute of Limitations—Pleading.**

The statute of limitations, to be available as a defense, must be pleaded. If not pleaded, the statute is waived, except in cases when the question is raised by demurrer. *Hardwick v. Ickler*, 71 Minn. 25, followed.

### **Power of Receiver over Clerk or Agent.**

A receiver appointed in a creditors' suit has no authority in law to

79	326
85	154

permit his clerk or agent to deal in the property belonging to the receivership, to his own interest and detrimental to the trust, nor can he ratify or sanction such act on the part of his agent or clerk, except, perhaps, by express authority and approval of the court appointing him, upon a showing to such court of all the facts.

Action in the district court for Winona county by plaintiff, as receiver of the estate of Niels C. Frederiksen, against Michael Hewetson and Bessie Hewetson, his wife, to enforce a constructive trust. The case was tried before Snow, J., who found in favor of defendants. From a judgment entered pursuant to the findings, plaintiff appealed. Reversed.

*Webber & Lees*, for appellant.

The money was received from Nunnenmacher charged with a trust in favor of the receiver. By virtue of his appointment as receiver Filkins became trustee for Frederiksen's creditors, holding his estate for their benefit. High, Rec. § 175; Smith, Rec. § 6. He had no power to sell, or to compromise claims, without sanction of the court. High, Rec. §§ 186, 191, 192; Smith, Rec. §§ 28, 34. Had he taken \$3,000 of the money received by him as receiver and invested it in land, the creditors could follow it and charge the land with a trust in their favor. G. S. 1894, § 4282; *Bitzer v. Bobo*, 39 Minn. 18; *Donahue v. Quackenbush*, 62 Minn. 132; 2 *Pomeroy*, Eq. Jur. §§ 1049, 1052, 1080. The clerk or sub-agent of a trustee or agent is, like his principal, prohibited from dealing with the trust estate for his own advantage. If he does so, he must refund the property or account for its value. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192, and note; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Burke v. Bours*, 92 Cal. 108; 2 *Pomeroy*, Eq. Jur. § 979. A receiver, trustee, attorney, agent, or any other person occupying a fiduciary relation respecting property or persons is disabled from acquiring, for his own benefit, the property committed to his custody for management. *King v. Remington*, 36 Minn. 15; *Lewis v. Welch*, 47 Minn. 193; *McKinley v. Williams*, 20 C. C. A. 312; *Mechem*, Ag. §§ 467-469; 1 Am. & Eng. Enc. (2d Ed.) 1072; *Fox v. Mackreth*, 2 Cox, 320; *Smitz v. Leopold*, 51 Minn. 455. Upon buying the Rice claim Upton became trustee for the creditors

represented by the receiver, and held the claim for their benefit. *Clark v. Stanton*, 24 Minn. 232; *Gillett v. Gillett*, 9 Wis. 194; *Sutliff v. Clunie* (Cal.) 37 Pac. 224; *Manhattan v. Dodge*, 120 Ind. 1.

Hewetson cannot claim that the receiver is not entitled to the money. Part payment of a demand is, without anything more, an admission of liability. 18 Am. & Eng. Enc. 232; *Shoemaker v. Benedict*, 11 N. Y. 176. A payment made under the circumstances disclosed should be deemed an equally conclusive admission of liability with that which is raised by the payment of money into court. 1 Jones, Ev. § 294; 1 Greenleaf, Ev. § 205. There were no laches. Where defendant does not show that he has been prejudiced by delay, and there is nothing except the lapse of time to indicate that delay was blamable, the right to maintain an action is not lost by any lapse of time short of the period fixed by the statute of limitations. *Burke v. Backus*, 51 Minn. 174; *Dutton v. McReynolds*, 31 Minn. 66; *Cameron v. Chicago, M. & St. P. Ry. Co.*, 60 Minn. 100. Where an agent seeks to avail himself of an advantageous transaction by reason of his confidential relation as employee, and such transaction is sought to be set aside after the transaction has become stale, the rule seems to be that it is very difficult for the agent to set up as a defense the laches of his employer. Length of time weighs less in this case than in any other. *Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, 797, note; *Sutherland v. Reeve*, 151 Ill. 384; *Gibbons v. Hoag*, 95 Ill. 45, 67; *Morse v. Hill*, 136 Mass. 60; *Fitzgerald v. Fitzgerald*, 44 Neb. 463; *Pence v. Langdon*, 99 U. S. 578, 581; 2 Pomeroy, Eq. Jur. §§ 805, 812; *Matter of Lord*, 78 N. Y. 109. An agent or trustee can only ratify such acts as he himself has power to do. 1 Am. & Eng. Enc. (2d Ed.) 1183; *Fargo v. Cravens*, 9 S. D. 646; *Duckett v. National*, 86 Md. 400; *Broder v. Conklin*, 121 Cal. 282.

*Munn & Thygeson* and *J. P. Kyle*, for respondents.

There was no fraud in connection with the Nunnenmacher transaction. After a considerable lapse of time, the evidence establishing a parol or implied trust ought to be very clear and satisfactory. *Randall v. Constans*, 33 Minn. 329, 338. There was no constructive fraud. Assuming, for the purpose of argument, that

Upton and Murphy and Hewetson were dealing with property of their principal, still there is no constructive fraud, because in all that they did in connection therewith they acted with the knowledge, consent, and acquiescence of the receiver, and he is estopped to assert they committed any fraud on him. 2 Herman, Estop. §§ 1061, 1063, 1064; 2 Pomeroy, Eq. Jur. §§ 958, 959, 965; Mechem, Ag. §§ 464, 466; 1 Am. & Eng. Enc. (2d Ed.) 1080, 1081; Bassett v. Brown, 105 Mass. 551. There was no constructive fraud, because Upton and the rest did not deal with any property in the hands of the receiver or to which he had any right or title.

The receiver had no right to the money received by Hewetson out of the Nunnenmacher transaction, because the receiver had no valid or enforceable claim against Nunnenmacher, and the court so finds. The settlement was not an admission of liability. 1 Greenleaf, Ev. § 192; Smith v. Morrill, 12 Colo. App. 233. Filkins was not receiver of any property of Frederiksen in Wisconsin. The decision of the Wisconsin court in the case of Filkins v. Nunnenmacher, 81 Wis. 91, is binding on the court and on the parties to this action. Cone v. Hooper, 18 Minn. 476 (531); Kipp v. Fullerton, 4 Minn. 366 (473); Thurston v. Thurston, 58 Minn. 279; Park Bank v. Remsen, 158 U. S. 337, 342.

Plaintiff cannot now claim any interest in the lands in question, because the money with which they were purchased was no part of the trust estate; because, at the time the lands were deeded to Hewetson, he was not in the employ of the receiver; because plaintiff has never reimbursed or offered to reimburse defendant for the moneys which he put into the lands.

The action cannot be maintained for the following other reasons: Because it appears that, at the time the action was commenced, plaintiff had no authority from the court to sue. High, Rec. § 801; Beach, Rec. §§ 650, 699; Swing v. White River, 91 Wis. 517; Pendleton v. Russell, 144 U. S. 640. Because the action is barred by the statute of limitations of this state, and of Illinois. Duxbury v. Boice, 70 Minn. 113; Humphrey v. Carpenter, 39 Minn. 115; Morrill v. Little Falls Mfg. Co., 53 Minn. 371; Broder v. Conklin, 121 Cal. 282. No repudiation of a constructive trust by the trustee is required in order to set the statute of limitations in motion. 2 Perry,

Trusts, § 865; Haynie v. Hall, 5 Humph. (Tenn.) 290; Wilmerding v. Russ, 33 Conn. 67; Kennedy v. Baker, 59 Tex. 150; Hecht v. Slaney, 72 Cal. 363; Nougues v. Newlands, 118 Cal. 102. The action is barred by the statutes of Illinois, and is therefore barred in this state. Luce v. Clarke, 49 Minn. 356. It is barred by laches and acquiescence. The defense of laches may be made without any formal plea thereof, or without any plea of the statute of limitations. 12 Am. & Eng. Enc. 609; Marsh v. Whitmore, 21 Wall. 178, 185; Bryan v. Kales, 134 U. S. 126, 135; Lakin v. Sierra Buttes G. M. Co., 25 Fed. 337; Maxwell v. Kennedy, 8 How. 210, 222; McLaughlin v. People's Co., 21 Fed. 574; Jones v. Perkins, 76 Fed. 82. Delay for a period sufficient to deprive complainant of the right to enforce his demand in a court of law is such laches as will justify dismissal of a bill in equity. 12 Am. & Eng. Enc. 566; 1 Pomeroy, Eq. Jur. § 419; Rugan v. Sabin, 53 Fed. 415, 421, 10 U. S. App. 519; Godden v. Kimmell, 99 U. S. 201, 210; Ashhurst's Appeal, 60 Pa. St. 290; Breit v. Yeaton, 101 Ill. 242, 245; Galliher v. Cadwell, 145 U. S. 368, 372; Harwood v. Railroad Co., 17 Wall. 78; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Hayward v. National Bank, 96 U. S. 611; Holgate v. Eaton, 116 U. S. 33; Davison v. Davis, 125 U. S. 90; Societa Fonciere v. Milliken, 135 U. S. 304; Peabody v. Flint, 6 Allen, 52; Thompson v. Lambert, 44 Iowa, 239; International v. Bremond, 53 Tex. 96; Chetwood v. Berrian, 39 N. J. Eq. 203.

BROWN, J.

This is an action to enforce a constructive trust. The defendants had judgment in the court below, and the plaintiff appeals.

The facts, in brief, are as follows: In December, 1889, in a creditors' suit brought in the superior court of Cook county, in the state of Illinois, one Edward A. Filkins, of the city of Chicago, was duly appointed by said court receiver of the property and estate of the defendant in such action, Niels C. Frederiksen, with all the powers, rights, and duties of receivers in such cases. Said Filkins duly qualified as such receiver, and thereafter continued to act as such until August 5, 1892, when he resigned, and afterwards, by proper order of the same court, the plaintiff in this action was duly

appointed his successor. Plaintiff duly qualified as such, and now is the duly-qualified and acting receiver in such matter. At the time of the appointment of such receiver, said Frederiksen resided in the state of Illinois. In addition to such appointment, said superior court duly made a further order requiring said Frederiksen to deed and transfer to said receiver all and singular his property, real, personal, and mixed, and requiring and ordering that, in case of his failure to make such transfer, John T. Noyes, a master in chancery of said court, do so for him. Frederiksen refused to make the transfer, and said master in chancery duly made and executed a proper conveyance of said property to such receiver.

From December, 1889, to August, 1892, the defendant Michael Hewetson was in the employ of said receiver as clerk, and as such had general charge of the business of the receivership, with access to the books and papers pertaining thereto, and during the whole of said time occupied a position of trust and confidence to said receiver with respect to the business, property, and effects belonging to the estate. Among other items of property claimed by said receiver to belong to said Frederiksen, and to said receiver, by virtue of his said appointment, were certain causes of action against one Nunnenmacher for the recovery of usurious interest by him unlawfully taken from Frederiksen, which causes of action were claimed to amount in the aggregate to between \$100,000 and \$200,000; the facts with reference to which were unearthed and brought to light by said Hewetson acting as such confidential clerk. Said Nunnenmacher resided in the state of Wisconsin. The receiver brought an action in the circuit court of that state, seeking a recovery upon such causes of action, and the supreme court of that state held that a receiver appointed by the court of another state could not maintain such an action in the state of Wisconsin. *Filkins v. Nunnenmacher*, 81 Wis. 91, 51 N. W. 79. A motion for a reargument of said cause was duly made to that court, and the same was pending at the time of the settlement to be presently mentioned.

During the time he was so acting as the agent and clerk of said receiver, said Hewetson also discovered from the books and papers in his charge and under his control that one Rice, a resident of the

state of Wisconsin, held and owned certain promissory notes against said Frederiksen, amounting in the aggregate to the face value of about \$96,000. Subsequent to the decision of said supreme court of Wisconsin, and pending the motion for a reargument, said Hewetson, and certain of the attorneys who had been retained by and were acting for said receiver, connived and conspired together to purchase said Rice notes, and therewith, and by means of a suit thereon against Frederiksen in the courts of Wisconsin, coupled with a garnishment against said Nunnenmacher, to force a settlement with said Nunnenmacher upon said causes of action so due to said Frederiksen, and to appropriate the proceeds thereof to their own use and benefit. Said Hewetson and attorneys understood from the decision of said Wisconsin supreme court that the receiver could not enforce his claim to the causes of action against Nunnenmacher in the courts of that state, and they sought to take advantage of the situation, and secure the same for their own benefit. In pursuance of this agreement between said Hewetson and said attorneys, said Hewetson, some time in the year 1891, negotiated a sale of said promissory notes from said Rice to one of said attorneys for the sum of \$3,000. Later on in said year, and while said receiver's action to recover from said Nunnenmacher was still pending in said supreme court of Wisconsin, said attorney to whom said notes were sold and transferred brought suit thereon in the circuit court of Wisconsin against said Frederiksen, the maker thereof, and said Nunnenmacher as garnishee, seeking thereby to charge said Nunnenmacher with the indebtedness which the receiver was endeavoring to obtain by his suit. The attorneys so engaged with said Hewetson were the same attorneys who were acting for the receiver in his suit against Nunnenmacher.

In February or March, 1892, the said attorneys procured a settlement from said Nunnenmacher of both the receiver's suit and the action brought by them on said Rice notes, and Nunnenmacher paid to them in full adjustment of the Frederiksen claims against him the sum of \$36,000; \$1,000 in settlement of the receiver's suit, and \$35,000 in settlement of the suit on the Rice notes. The receiver accepted the \$1,000, supposing that that was all he could realize. He was so advised by said attorneys. The receiver knew that one

of his attorneys held the Rice notes, that action had been brought thereon, and also knew that negotiations were pending for the settlement thereof, but he did not know the nature of the settlement made. It was in August following this settlement that the plaintiff succeeded the former receiver.

Hewetson received, as his share of the profits of this transaction, the sum of \$5,333.33, of which sum he invested \$3,000 in the lands described in the complaint. The purchase price of the land was \$6,179.85. Of this Hewetson paid said \$3,000 in cash. The balance was paid subsequently, and from the proceeds of sales of certain portions of the land. Other facts are set out in the findings of the trial court, but the foregoing, though not as full and complete as such findings, is a sufficient statement to give an understanding of the questions presented.

The action is one to impress the land with a trust in favor of plaintiff to the extent, at least, of the \$3,000 invested therein by Hewetson from the proceeds of the Nunnenmacher deal. It is founded on the fundamental principle of equity jurisprudence that a receiver, agent, attorney, or other person occupying a position of trust and confidence, respecting the business or property of another, will not be permitted or allowed to take advantage of his position to deal or traffic in the property or property rights of his trust to his own advantage or benefit. A person occupying such fiduciary relation is held strictly to an honest performance of his duties in the interests of his principal, and to the absolute exclusion of his own personal interests. The principle is very clearly stated in *King v. Remington*, 36 Minn. 15, 29 N. W. 352:

A receiver, trustee, attorney, agent, or any other person occupying fiduciary relations respecting property or persons is utterly disabled from acquiring for his own benefit the property committed to his custody for management. This rule is entirely independent of the fact whether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from the trustee. It is to avoid the necessity of any such inquiry that the rule takes so general a form. The rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts between self-interest and integrity. It seeks to remove the temp-



tation that might arise out of such a relation to serve one's self-interest at the expense of one's integrity and duty to another, by making it impossible to profit by yielding to temptation. It applies universally to all who come within its principle.

This case comes fairly within this principle. Hewetson was a trusted clerk and confidential adviser of the receiver; had full charge of the conduct of the receivership, subject to the approval of the receiver; and, with knowledge and information gained while holding such position, he, with the attorneys of the receiver, sought to enrich themselves at the expense of the trust estate. He may have proceeded in good faith,—may have supposed that the receiver had no title or interest in the Nunnenmacher claims,—but his good faith does not relieve him. It is not necessary to show fraud in such cases. Equity declares all such transactions illegal, and all profits accruing to the trustee to belong to the cestui que trust, without regard to any intentional or other fraud. *King v. Remington*, supra. The court below recognized this principle, but disposed of the case adversely to plaintiff, mainly on the theory that the Nunnenmacher causes of action did not pass to the receiver, and that he was in no way injured by the transaction. Counsel for respondents urge this and other reasons in support of their contention that the judgment should be affirmed. We are satisfied that the findings of fact are sufficient to warrant a judgment in plaintiff's favor, unless the position of the trial court with respect to some legal questions is correct. We will therefore turn our attention to such questions.

1. It is urged by respondents, and the court below held, that there was no showing of a legal liability on the part of Nunnenmacher to Frederiksen on account of the alleged causes of action for usurious interest, and that, in consequence, the receiver lost nothing by the conduct of Hewetson and the attorneys, and cannot complain. This contention cannot be sustained. Hewetson unearthed, by an examination of the books and papers belonging to Frederiksen, what he considered, and what all the attorneys considered, and evidently believed, to be a valid claim against Nunnenmacher, amounting to more than \$100,000. The receiver's action in Wisconsin was brought to recover upon that claim. It is not

important whether the claim was in point of law valid and enforceable. To end the litigation, not only the receiver's suit, but the one brought by the attorneys, in which Nunnenmacher was made garnishee, upon the theory that he was indebted to Frederiksen, Nunnenmacher settled with the attorneys, and paid them upon that claim the sum of \$36,000. He thereby confessed an indebtedness to Frederiksen in that sum. It belonged to Frederiksen, and the defendant and attorneys engaged with him appropriated it to their own use. They were engaged to act for the receiver, and were under every moral and legal duty to preserve and protect the interest of the trust estate. The money was paid to them in settlement of a cause of action which they knew was claimed by the receiver, and they cannot be heard to say that Nunnenmacher was not legally liable thereon.

2. The court below also held, in line with respondents' contention, that no title or interest in or to the Nunnenmacher cause of action passed to the receiver by the order of the court appointing him, or by the deed of the master in chancery. This contention is not based on any defect or omission in the order or deed, but upon the claim that the supreme court of Wisconsin so held, and it is insisted that the courts of this state should follow that decision. In this position we cannot concur.

By the order of the Illinois court, plaintiff was appointed receiver of all of Frederiksen's property, real, personal, and mixed, including choses in action of every kind, and the deed of the master in chancery conveyed the same to him. The decision of the Wisconsin supreme court is quite broad, and, on its face at least, seems to justify respondents' contention. It is there stated, in effect, that a receiver appointed in a creditors' suit by a court of another state acquires no title or interest to property located in Wisconsin. Whether this is sound law we need not consider. We do not believe that that court intended its decision to go to that extent. It certainly could not have intended so to decide with respect to the property here involved, because it was not located in that state at the time the receiver was appointed or since. The property consisted of certain causes of action for alleged usurious interest taken by Nunnenmacher from Frederiksen, and amounted to a debt or

chose in action, and had a situs at the residence of the creditor. Frederiksen resided in the state of Illinois at the time of the appointment of the receiver, and, in contemplation of law, this cause of action, or these causes of action, were with his person in said state, and undoubtedly passed to the receiver. *Swedish-Am. Nat. Bank v. Bleecker*, 72 Minn. 383, 75 N. W. 740; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *State v. Gaylord*, 73 Wis. 316, 41 N. W. 521; *National v. Furtick*, 2 Marvel (Del.) 35, 69 Am. St. Rep. 99, and cases cited in note on page 117. We do not, therefore, believe that the Wisconsin court intended to hold that the receiver acquired no title to the causes of action against Nunnenmacher, but only that he could not maintain an action to recover thereon in that state. That the court intended to go no further than this is evident by the syllabus. It is clear to us, and we hold, that the Nunnenmacher causes of action passed to the receiver, belonged to the trust estate, and that Hewetson and the attorneys had no right to purchase or to otherwise acquire the same for their own profit and benefit.

3. Respondents' contention that the plaintiff's cause of action is barred by the statute of limitations is wholly untenable. The case of *Hardwick v. Ickler*, 71 Minn. 25, 73 N. W. 519, most effectually puts at rest the question whether the statute must be pleaded to be available as a defense. It is there held that the statute is waived if not pleaded; and this, notwithstanding the bar of the statute may appear on the face of the complaint. The claim that plaintiff's cause of action is barred by laches is also untenable.

4. Counsel also urge that the receiver knew that his attorneys had purchased the Rice notes, and were endeavoring to enforce the same against Nunnenmacher, and that he made no objection thereto, but silently acquiesced therein, and it is claimed that he thereby waived all right to object to the transaction or to bring the parties to account. While it is true that the receiver had some knowledge as to the purchase of the Rice notes by Hewetson and his attorneys, and that they were endeavoring to enforce the claim against Nunnenmacher, this by no means amounts to a waiver of his rights or to a ratification of the acts of his agents. He was himself an agent, a trustee of an express trust, and he could not permit or

authorize his agent to do with the trust estate that which he himself could not do. He could not speculate in the trust property to his own advantage and benefit, nor could he authorize his agents to do so. It would be a perversion of the law to hold that an agent could, by his silence, authorize, ratify, or sanction an act he could not expressly authorize, sanction, or approve.

We have examined all the other points made by respondents, and find none of them fatal to appellant's right of recovery. The facts found by the trial court warrant at least a portion of the relief demanded in the complaint, and the judgment should have been for plaintiff. It is beyond question that Hewetson and the attorneys engaged with him violated the trust reposed in them, and they should be compelled to account. Hewetson acquired, with \$3,000 of his share of the profits of the deal, the lands in question, and the receiver should be adjudged to have a specific lien thereon to the extent of such \$3,000, and interest since the date of the Nunnenmacher settlement at the rate allowed by law. The judgment appealed from is therefore reversed, and the cause remanded, with directions to the court below to amend its conclusions of law so as to direct the entry of judgment in plaintiff's favor, adjudging and decreeing said sum of \$3,000 and interest to be and constitute a specific lien upon the lands in question, and authorizing the enforcement thereof by execution, as in other cases.

Judgment reversed.

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A. H. FLETCHER v. GERMAN-AMERICAN INSURANCE COMPANY  
OF NEW YORK.

May 2, 1900.

Nos. 12,121—(46).

79	337
82	338
82	339

### Fire Insurance—Proof of Loss “Forthwith.”

The terms of a fire insurance policy requiring proof of loss to be furnished the insurance company forthwith construed as requiring such proof within a reasonable time.

79 M.—22

**Question of Reasonable Time for the Jury.**

The question whether such proof of loss was furnished defendant in this case within a reasonable time was, under the evidence, a question for the jury, and was properly submitted to them.

**Laws 1895, c. 175, § 53—Arbitration.**

The arbitration provided for by Laws 1895, c. 175, § 53, is not a condition precedent to the right of action upon the insurance policy, unless the parties actually disagree as to the amount of the loss.

**Exertion to Save Insured Property—Failure Matter of Defense.**

Nor is it necessary for the insured to show, in the first instance, in an action upon such policy, that he complied with a provision thereof requiring him to make all reasonable exertions to save the insured property in case of fire. If he failed to comply with such provision, it must be pleaded by, and the burden of proof is with, the company.

Action in the district court for Cottonwood county to recover \$1,000 and interest on a fire insurance policy. The case was tried before P. E. Brown, J., and a jury, which rendered a verdict in favor of plaintiff for \$874.75. From a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

*Palmer & Beck*, for appellant.

Proofs of loss were not furnished "forthwith," within the meaning of that word as used in the statutory policy. *Weed v. Hamburg-Bremen*, 133 N. Y. 394; *Quinlan v. Providence*, 133 N. Y. 356; *La Force v. Williams*, 43 Mo. App. 518; *Railway v. Burwell*, 44 Ind. 460; *Pickel v. Phenix*, 119 Ind. 291; *Trask v. State*, 29 Pa. St. 198; *Gould v. Dwelling*, 134 Pa. St. 570; *Edwards v. Lycoming*, 75 Pa. St. 378; *Accident v. Young*, 20 Can. S. C. 280; *Foster v. Fidelity*, 99 Wis. 447; *Smith v. Travelers*, 171 Mass. 357; *Whitehurst v. North Carolina*, 7 Jones, L. 433. The amount of loss not having been agreed on by the parties, it was a condition precedent to the right of action that the amount be ascertained by award of referees, as provided by statute and the policy. *Lamson v. Prudential*, 171 Mass. 433.

*Wilson Borst* and *T. A. Alexander*, for respondent.

"Forthwith" means within a reasonable time. *Sorenson v. Swensen*, 55 Minn. 58; *Anderson v. Goff*, 72 Cal. 65, 73; 13 Am. &

Eng. Enc. (2d Ed.) 1157. Under the evidence the question of reasonable time was for the jury. *Cochran v. Toher*, 14 Minn. 293 (385); *Roberts v. Mazeppa Mill Co.*, 30 Minn. 413; 19 Am. & Eng. Enc. (2d Ed.) 642; *Hamilton's Execs. v. Phoenix*, 22 U. S. App. 164. Failure to furnish proofs of loss, where no forfeiture is stipulated in case of breach of other requirements, and not in the case of failure to furnish proofs of loss within the time required, merely postpones the time of payment to the specified time after they are furnished. 13 Am. & Eng. Enc. (2d Ed.) 328, 329; *Steele v. German*, 93 Mich. 81; *Rynalski v. Insurance*, 96 Mich. 395; *Hall v. Concordia*, 90 Mich. 403; *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. 562; *Flatley v. Phenix*, 95 Wis. 618; *Vangindertaelen v. Phenix*, 82 Wis. 112; *Kenton v. Downs*, 90 Ky. 236.

The arbitration clause is intended to furnish an easy court of appraisal and arbitration to settle real differences. Until such real differences have arisen out of an honest effort between insured and the insurer, there is no occasion or authority for an appraisal and arbitration. 2 Beach, Ins. § 1244. The dispute must be bona fide. *Boyle v. Hamburg-Bremen*, 169 Pa. St. 349. See also *Chapman v. Rockford*, 89 Wis. 572; *Farnum v. Phoenix*, 83 Cal. 246; 2 Biddle, Ins. § 1157; *Vangindertaelen v. Phenix*, *supra*; *Hickerson v. Insurance*, 96 Tenn. 193. See *Nurney v. Fireman*, 63 Mich. 633; *Randall v. American*, 10 Mont. 340; *Mosness v. German-Am. Ins. Co.*, 50 Minn. 341; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291. If the company denies its liability for any other reason, it cannot object that no arbitration has been had. *Hickerson v. Insurance*, *supra*. See also 2 Beach, Ins. § 1244; 13 Am. & Eng. Enc. (2d Ed.) 365; 2 Biddle, Ins. 1175; *Rosenwald v. Phoenix*, 50 Hun, 172; *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335; *Lum v. U. S.*, 104 Mich. 397; *McCormick v. Royal*, 163 Pa. St. 184; *Omaha v. Dierks*, 43 Neb. 473; *Phoenix Co. v. Taylor*, 5 Minn. 393 (492); *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 98 (123); *Hand v. National L. S. Ins. Co.*, 57 Minn. 519; *Hayes v. Milford*, 170 Mass. 492. The answer did not allege facts sufficient to raise the question of arbitration under the provisions of the policy. 11 Enc. Pl. & Pr. 824; *Sussex v. Woodruff*, 26 N. J. L. 541; *American Employers' L. Ins. Co. v. Barr*, 32 U. S. App. 444.

BROWN, J.

This is an action to recover upon a fire insurance policy issued by defendant to plaintiff, covering a stock of general merchandise. Plaintiff had a verdict in the court below. Defendant moved the court for judgment notwithstanding such verdict, or for a new trial, which was denied, and it appeals from the judgment entered on the verdict. Appellant assigns some thirty errors, but counsel have classified them under seven propositions, and we will consider them as so classified. There is no question but that plaintiff sustained a loss under his policy, and no doubt about the liability of defendant, unless it is relieved by some of the matters set up in defense.

1. It is claimed that proof of loss was not furnished by plaintiff within the time required by the terms of the policy. The provision of the policy on this subject is as follows:

"In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company."

The property insured was destroyed by fire on August 4, 1897. Proof of loss was forwarded to defendant on the 31st of the same month, and defendant's contention is that this was not "forthwith," within the meaning of the contract. At the time the policy was issued, and at the time of the fire also, plaintiff was a resident of the state of Illinois. His son had charge of the insured property, and was conducting a general mercantile business in his father's name in this state, at Okabena, Jackson county. Immediately after the fire, he notified the company thereof, and an adjuster soon after appeared, and made some sort of an examination and investigation into the matter. The adjuster was informed that plaintiff resided in the state of Illinois, and was not then in this state, and he suggested to the son that proper proof of loss be made out, and forwarded to the company as soon as the father should reach the state, and the son agreed that it should be done.

The provision of the policy requiring proof of loss to be rendered to the company forthwith must be construed as requiring it within a reasonable time. *Sorenson v. Swensen*, 55 Minn. 58, 56 N. W. 350; 13 Am. & Eng. Enc. 1157. And the question whether the

proof was furnished within such time was a question for the jury to determine upon all the evidence in the case. *Roberts v. Mazzeppa Mill Co.*, 30 Minn. 413, 15 N. W. 680; *Cochran v. Toher*, 14 Minn. 293 (385). Defendant had immediate notice of the fire, though it was not in form of properly executed proof, and had full and ample opportunity to examine into the circumstances of the fire, and there is no suggestion that it was in any way prejudiced by the delay in furnishing the formal proof. The object, or at least one of the objects, in requiring immediate or forthwith proof of loss, is to give ample opportunity to the company to investigate into the cause of the fire and the nature and extent of the loss, and make such other investigation and inquiry as a long delay might render futile and fruitless. Defendant was not deprived of the opportunity of early action in this instance, and we sustain the finding of the jury that formal proof of loss was furnished within a reasonable time after the fire.

2. It is contended by appellant that, because there was no arbitration fixing the amount of the loss, as required by the terms of the policy and by Laws 1895, c. 175, § 53, plaintiff's action was prematurely brought, and he cannot recover. The provisions of the policy on this subject are as follows:

"In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees, as hereinafter provided. \* \* \* In case of loss, except in case of total loss on buildings, under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such referees [reference], unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss."

The statute referred to is, in substance, the same. It provides that the amount of the loss, if not agreed upon, shall be submitted to arbitration. The position of appellant on this question is that



arbitration is a condition precedent to the right to sue on the policy, unless it expressly appears that the parties have mutually agreed upon the amount of the loss; in other words, or expressed differently, that it must appear that the parties have mutually agreed upon the amount of the loss, or, if it does not so appear, an arbitration must be had, before suit can be brought. We cannot adopt this construction. Giving the policy a broad and liberal construction, we interpret it to mean that, when the parties are unable to agree upon the amount of the loss, the question of such amount shall be submitted to arbitration. Until there is some disagreement as to the amount of the loss, there is no occasion for any arbitration; there is nothing to arbitrate.

In this case the proof of loss furnished defendant specified the amount claimed by plaintiff. Defendant made no objection thereto, and, after the lapse of sixty days, plaintiff brought this action. Defendant, having made no objection to the amount claimed by plaintiff, must be taken to have acquiesced therein; at least it must be held that, inasmuch as no objection was made to the amount claimed, there was nothing to found an arbitration upon, and none was necessary. This construction is in harmony with the objects and purposes of the law and the terms of the policy, and we adopt it as the most reasonable and consistent. *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005; *Vangindertaelen v. Phenix*, 82 Wis. 112, 51 N. W. 1122; *Hickerson v. Insurance*, 96 Tenn. 193, 33 S. W. 1041.

3. The policy contains a provision to the effect that the insured shall make all reasonable exertions to save the insured property in case of fire, and appellant claims that plaintiff failed to comply therewith. The complaint does not allege a compliance by the plaintiff with this provision, but the answer alleges a failure to comply with it. At the trial the court instructed the jury that the burden was upon the defendant to show a breach of the terms of the policy in this respect. This instruction was excepted to by defendant, and is assigned as error. The instruction was correct. It is undoubtedly the duty of the insured fully to comply with the terms of his policy, not only in respect to a provision of this kind, but in all other respects as well, and a wilful failure to do so will

defeat a recovery. But the terms of this policy do not require the insured to show, as a condition precedent to his right of action, a compliance with such provision, and we are not aware of any rule of pleading or practice that casts such burden upon him. A breach of the contract in this particular is new matter constituting a defense to the action, and must be pleaded and proven by the defendant.

4. The claim that the verdict is some \$62 too large cannot be considered on this appeal, because it does not appear to have been called to the attention of the court below. *Bank of Commerce v. Smith*, 57 Minn. 374, 59 N. W. 311.

5. We have examined all the other assignments of error, and find no error of sufficient importance to justify a reversal. The charge of the learned trial judge, to which some exceptions were taken, was a very full, fair, and clear statement of the issues, was in line with the law as we have here announced it, and contains no error.

Judgment affirmed, but without prejudice to the right of appellant to apply to the court below for a modification of the judgment as to the \$62.

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STATE v. MARY W. CAMP.

May 2, 1900.

Nos. 12,221—(265).

79	343
80	122
80	123

**State Assignment Certificate and Title—Subsequent Sale for Prior Taxes.**

Where lands have been sold for taxes, and bid in for the state, and the state subsequently assigns all rights and interests acquired by it under such sale to an individual, who thereafter perfects the title thereunder, the state cannot impeach or impair such title by a resale of the lands for taxes due and unpaid for prior years.

**Title Derived from State Assignment Certificate.**

The holder of a "state assignment certificate," who perfects title thereunder, acquires thereby a title in fee simple to the lands covered thereby, free and clear of all prior liens or claims in favor of the state or individuals.

In proceedings in the district court for Hennepin county under Laws 1899, c. 322, to enforce payment of taxes which became delinquent in and prior to the year 1897, Mary W. Camp interposed an answer making defense against taxes for years prior to 1893 on certain land. The case was tried before Harrison, J., who found in favor of defendant, and certified the case to the supreme court for its determination of the point stated in the opinion. Affirmed.

*Louis A. Reed*, County Attorney, and *C. S. Jelley*, for plaintiff.

*M. P. Brewer*, for defendant.

Counsel cited *Wass v. Smith*, 34 Minn. 304; *Irwin v. Trégo*, 22 Pa. St. 368, 374; *Anderson v. Ryder*, 46 Cal. 135; *Dougherty v. Henarie*, 47 Cal. 9; *Sayles v. Davis*, 22 Wis. 217, 229; *Preston v. Van Gorder*, 31 Iowa, 250; *Emmons v. Bennett* (N. D.) 81 N. W. 22.

BROWN, J.

This is a proceeding under the forfeited tax law of 1899 (Laws 1899, c. 322). It was certified to this court by the district court of Hennepin county for our decision upon one question, namely: Where lands have been sold for taxes, and bid in for the state, and the state subsequently assigns all rights and interests acquired by it under such sale to an individual, who thereafter perfects title thereunder, can the state then proceed and resell the lands under the forfeited tax law aforesaid for taxes due and unpaid for prior years? The court below held that it could not, and we sustain that conclusion.

The facts are, in brief, as follows: The state, county, and other taxes were duly assessed against the lands mentioned in the certified record for the year 1893. The same were not paid, became delinquent, and tax judgments therefor were duly and regularly rendered and entered against the same in March, 1895. At the tax sale in May of that year such lands were bid in for the state, there being no bidders at such sale, and, there being no redemption therefrom, the rights of the state were duly assigned to defendant herein, Mary W. Camp, and the proper state assignment certificate was duly issued to her. Said Camp was in no way interested in said lands prior to the issuance of such assignment certificate, and was under no duty or obligation to pay such taxes. She has duly

perfected title to such lands under and by virtue of such sale and assignment certificate, having caused the service of a proper notice of the expiration of redemption, and no redemption ever having been made, she is now the absolute owner of such lands in fee simple. Before such sale for said taxes of 1893, taxes had been duly and regularly levied and assessed against said lands for several years prior thereto, tax judgments had been duly obtained and entered, and the land sold thereunder, for each of such prior years, and duly bid in for the state, and the state has at all times since, and now does, retain the title and rights thereby acquired. No assignment of any of such prior sales has ever been made, nor has there ever been a redemption therefrom. The question to be determined is, having assigned the title and rights acquired by it under and pursuant to the sale for the taxes of 1893 to Camp, and she having proceeded and perfected her title thereunder, and made it absolute, can the state now proceed against the lands for the taxes remaining unpaid for prior years?

Tax liens take priority in the reverse order of other liens. As to all other liens, the first in order of time is, *prima facie*, superior to those of a later date. In the case of tax liens, however, the "last shall be first and the first last." The general and universal rule is that in proceedings in rem to enforce the payment of taxes, the last tax levied and sought to be enforced is superior and paramount to the lien of all prior taxes, claims, or titles. If a tax title be valid in law and in equity, it operates effectually to clear the title to the land covered by it of all prior liens, claims, or titles, however acquired or obtained. *Burroughs*, Taxn. 347; *Wass v. Smith*, 34 Minn. 304, 25 N. W. 605; 2 *Desty*, Taxn. 849, and cases cited.

This general rule is recognized by counsel for the state, but it is contended by them that the interests of the state in the matter of collecting its revenue require and make it proper to except the state from its operation. Counsel are quite right. The interests of the state would be best subserved and protected by exempting it from the operation of the rule. But such exemption cannot be made unless authorized by statute. The rule applies to the state as well as to an individual (25 Am. & Eng. Enc. 277, and cases cited in the notes; *Dougherty v. Henarie*, 47 Cal. 9; *Irwin v. Trego*, 22 Pa. St.

368, 375; *Law v. People*, 116 Ill. 244, 246, 4 N. E. 845); and, as we view the subject, the whole controversy must be disposed of in the light and by the guide of our statutes. If we do not there find a remedy to protect the interests of the state, the question must be referred to the legislature. If, as properly construed and interpreted, the statutes furnish such a broad and safe retreat for the "tax dodger," as pictured by counsel, the remedy is with the other branch of the government. A very few changes will serve effectually to bring such "dodgers" into line with honest taxpayers. We may also agree with counsel for the state that, when a certificate of sale has been duly assigned by the state, the state parts only with the interest it has in the land; but we cannot concur in the further contention that it retains the right to enforce prior taxes against the same land as against a title acquired and perfected under such assignment. If the state permits the assignment certificate to ripen into an adverse title, all its rights as to prior taxes must be held to have been lost. See authorities *supra*.

The lien of taxes under our statutes dates as of May 1, and the last tax levied takes precedence over the lien of all prior taxes. Regular and orderly proceedings looking to the enforcement of such taxes are provided for from the inception or levy of the tax to the entry of judgment and sale thereunder. In all cases where there are no bidders at the tax judgment sale the lands are struck off to and bid in for the state. The state may subsequently assign its rights, as was done in this instance. And G. S. 1894, § 1600, provides that

"The taxes for subsequent years shall be levied on property so sold or bid in for the state, in the same manner as though the sale had not been made."

This statute makes it the duty of the officers in charge of the administration of the tax laws to levy taxes on land sold to an actual purchaser or bid in for the state, each succeeding year, in the same manner as though no such sale had been made. It being thus made proper to levy a tax on land held by the state, it must be held proper, in the natural order of statutory requirements, that such officers proceed with such taxes to judgment and sale. It

was held by this court in *Berglund v. Graves*, 72 Minn. 148, 75 N. W. 118, that it is not necessary for the state to proceed to judgment and sale when the land stands bid in for the state, and in *Countryman v. Wasson*, 78 Minn. 244, 80 N. W. 973, that it might do so. If the executive officers of the state would follow the decision in the *Berglund* case, the interests of the state would be fully protected, and no injuries follow, except, perhaps, such as might arise and result from defective tax judgments or sales,—a condition not to be presumed. The rights of the state in and to all subsequent taxes, where the land stands bid in for the state, are expressly preserved by the redemption statutes, which require the redemptioner to pay the amount for which the lands were bid in, together with all subsequent taxes, penalties, and costs.

It is suggested that the "tax dodger" may again find comfort here, for it is said, if the tax judgment or sale be defective, he will permit subsequent taxes to accumulate, and never pay them. In case of a defective judgment or sale this might prove true. To avoid it, the state must obtain valid judgments. The courts cannot be looked to to enlarge statutes, by construction and interpretation, to intercept and obstruct those who make a study to avoid the payment of taxes. The duty of enacting revenue laws is with the legislature, not with the courts.

It is held in *Countryman v. Wasson*, *supra*, that the state may, at its option, proceed to judgment and sale of lands for subsequent taxes in cases where the same stand bid in in the name of the state, but that such sale does not have the effect of divesting the state of its liens for prior unpaid taxes. If the proper construction of that decision be that the holder of a state assignment certificate may not proceed under the statutes, and perfect a title thereunder which will be superior to all other prior titles or liens, whether held by the state or by an individual, we cannot follow it. The statutes provide (sections 1582, 1593, 1601) that a tax judgment shall bind "every estate, right, title, interest, claim or lien, in law or equity, in, to or on such piece or parcel of land, of every person, company, or corporation," and that a purchaser at a tax judgment sale, or one who has perfected title under a state assignment certificate, shall acquire thereby a title in fee simple. This is in

accordance with the general rule of law on the subject, and, as we have seen, binds the state as well as individuals, in the absence of some statute continuing its lien for prior taxes. There is no exception or provision of that kind in our statutes. The precise point here under consideration was not involved in the Countryman case. The main contention in that case was that the state had no power or authority, where lands stand bid in for the state, to proceed to a judgment and sale as to subsequent taxes. The court decided the question adversely to such contention, and what is there said on the point here in hand may be said to be obiter dicta. That the learned justice of this court who wrote the opinion in that case subsequently doubted the correctness of such dicta is shown by his memorandum filed on the motion for a reargument.

As stated, this question must be determined in the light of our statutes. They will be searched in vain for any provision to assist the state out of its present dilemma. Where lands have been bid in for the state, subsequent taxes must be levied and assessed as though no such sale had been made. If the subsequent tax levy result in a judgment and second sale to the state, and the state assign its rights thereunder, it must be held to have lost all right to enforce prior taxes, in view of G. S. 1894, §§ 1582, 1593, 1601, *supra*, which provide that a title thus acquired is superior to all prior liens and claims.

Order affirmed.

START, C. J. (dissenting).

I dissent. On December 4, 1899, this court held:

"Where land has been bid in for the state at a tax sale, and has not been redeemed, or the interest of the state assigned, the state may obtain a tax judgment and sell the land for the taxes for subsequent years; and under such circumstances the sale will not extinguish the lien of the state for the prior taxes for which it was bid in." Countryman v. Wasson, 78 Minn. 245, 80 N. W. 973.

This seems to me to be decisive of the case at bar, for, as expressly held in the case cited,

"When the state levied taxes for subsequent years, it was not taxing its own interest in the land, but merely the interest of the

delinquent taxpayers, and when it sold the land for the tax that interest was all it sold." *Id.*

Therefore a purchaser at such a subsequent sale would take his title subject to the paramount lien of the state as to him for the prior taxes. The state retaining such paramount lien, it necessarily follows that it may enforce the lien by a sale of the land, notwithstanding the sale thereof for subsequent taxes. But it is said in the majority opinion that this is obiter dicta. Such is not my understanding. It is true that the question to be decided in that case was whether, in cases where land had been bid in by the state at a tax sale, and had not been redeemed, or the interest of the state assigned, a tax judgment and sale of the land for the taxes for subsequent years were authorized by the statute. A determination of this question involved a construction of G. S. 1894, § 1600, which is in these words:

"The taxes for subsequent years shall be levied on property so sold, or bid in for the state, in the same manner as though the sale had not been made; and if the purchaser or assignee of the state shall pay such taxes, the amount thereof, with interest from the date of payment after they shall have become delinquent, at the same rate as is provided upon the amount bid on the sale, shall be added to and be a part of the money necessary to be paid for redemption from sale."

It was urged in support of the contention that such subsequent sales were not authorized; that, if made, their legal effect would be to extinguish the lien of the state for the taxes of prior years; hence it was unthinkable to impute to the legislature such an intention. Therefore, for the purpose of ascertaining the legislative intention, it became necessary to determine what the effect, if any, of such a sale would be upon the lien of the state for the taxes of prior years; and the court necessarily determined the question as a basis for its conclusion that the statute did authorize such sale. The two propositions decided, as stated in the subdivision of the syllabus I have quoted, should stand or fall together. The decision ought to be followed as a whole or entirely overruled. But to affirm the proposition as to the authority to make the sale, and overrule or disregard the other proposition as to the effect of such



sale, as the majority opinion in effect does, will, in my judgment, be most disastrous to the interests of the state. I am not clear that the main proposition in the Countryman case was correctly decided. Upon further consideration I am inclined to the opinion that section 1600 does not authorize a sale of the land for the taxes of subsequent years where the state has bid in the land for the taxes of a prior year, and still retains its interest so acquired, but that the taxes for subsequent years are to be levied as though no sale had been made to the state; and the amount thereof, with interest, is to be added or tacked to the lien of the state on the land by virtue of such sale to it, and collected with it. If this construction of the statute were to be adopted now, it would lead to the conclusion that the sale for the subsequent taxes was void, and hence the lien of the state for prior taxes remained intact. However this may be, I am of the opinion that the Countryman case should be adhered to on the doctrine of stare decisis.

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JOHN H. BRIGHAM v. CONNECTICUT MUTUAL LIFE INSURANCE  
COMPANY.

May 4, 1900.

Nos. 11,872—(33).

**Mortgage Foreclosure—Service of Notice of Sale.**

Service of notice of mortgage foreclosure upon a person of suitable age and discretion, then resident in a suite of rooms of an apartment house, by handing to and leaving with such person a copy of such notice in the absence of the person to be served, is a complete service, although such person is not a member of the family or household of the person on whom service is made.

Action in the district court for St. Louis county to set aside a mortgage foreclosure sale. The case was tried before Ensign, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*Jaques & Hudson*, for appellant.

*S. T. & Wm. Harrison*, for respondent.

LOVELY, J.

It is sought to set aside a mortgage foreclosure sale made by advertisement under G. S. 1894, c. 81, tit. 1, upon the ground that no proper service of the foreclosure notice was made upon the occupant in possession of the mortgaged premises,—a lot in the city of Duluth,—under the requirements of section 6032 of the chapter referred to. This case was here before upon an appeal from a refusal of the trial court to find fully upon the facts constituting the alleged service,—in respect to its being made upon the mortgagor at the “house of his usual abode, with some person of suitable age and discretion then resident therein.” 74 Minn. 33. 76 N. W. 952. In the present action the court below found very fully upon the contested service,—the facts which, it is claimed, sustain its conclusion of law that the service was good, and that the sale of the mortgaged property was valid.

The court found as facts: That plaintiff, Brigham, was the owner of a flat or apartment consisting of five rooms, all of which adjoined a common hall on the second floor of a house on the mortgaged lot in the city of Duluth. He had leased all of these rooms but one to Mary and Maggie McFadden; reserving this one room for himself, where he slept. He obtained his meals outside the building. This apartment was constructed and intended for a family residence. There was also another room in the attic, reserved to plaintiff, which he could only reach by passing through the kitchen of the same suite. This was the actual and only abode of plaintiff. The entrance to his reserved room was by means of a front stairway, which ascended to the hall referred to, from which all the rooms in the flat were accessible. At the time of the service the deputy sheriff went to the premises to find plaintiff, who was absent from home, and substituted service was then made upon him through the McFadden sisters, who were persons of suitable age and discretion, and the only persons found on the premises who resided in this flat. The service thus attempted was made by handing to and leaving with each of these ladies two true and correct copies of the necessary notice, which in all other respects was served in accordance with law. It does not appear whether the notices were delivered by the McFaddens, or either of them, to

plaintiff; but there is evidence tending to show that before the sale he knew of the foreclosure proceedings, by inspection of the records.

Upon the service thus made, the deputy sheriff returned that he had served the notice upon the plaintiff, as occupant of the premises, by leaving copies of the same, as above stated, with the Misses Mary and Maggie McFadden, at the house of plaintiff's usual abode, with said persons, who were of suitable age and discretion, then resident therein. In this respect the return strictly follows the language and requirements of the statute, and is presumably a compliance with the law, unless the fact that the reservation of a single room by an owner of a building, as in this case, makes such room the house of his usual abode, as distinct from the remainder of the flat; and we cannot hold that it does. Such a construction of the statute, besides violating the plain terms of the law itself, which provides a rule for substituted service, and which should be construed with reasonable strictness, must lead to confusion, and would impose, by unreliable conditions and appearances, upon the officer who is required to make the service. In this case we hold that the entire flat or apartment, under the facts as found, constituted the house of plaintiff's usual abode; that the McFaddens were residents therein, and of suitable age and discretion. From which it follows that a proper service of the notice was made upon plaintiff, and the order appealed from must be affirmed.

Order affirmed.

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JOHN A. NORDEEN v. C. M. BUCK.

May 4, 1900.

Nos. 11,966—(66).

### **Right to Jury Trial.**

*Held*, upon a review of the pleadings in this case, wherein a contractor sues to recover for work and labor, as well as for materials furnished, that he was, as a matter of right, entitled to a jury trial.

**Same.**

In an action for the recovery of money only, requiring no equitable relief, either party is entitled absolutely to a trial by jury, although such trial involves the examination of a long account. *St. Paul & S. O. R. Co. v. Gardner*, 19 Minn. 99 (132), followed.

Action in the district court for Rice county to recover \$2,708.50, and interest, under a contract. The case was tried before Buckham, J., and a jury, which rendered a verdict in favor of plaintiff for \$2,056.60. From a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

*A. D. Keyes and T. H. Quinn*, for appellant.

*Peterson & Kolliner*, for respondent.

**LOVELY, J.**

This is an action brought by the plaintiff to recover the unpaid balance due him for the construction of a valuable building in the city of Faribault, under a written contract wherein he, as contractor, agreed with defendant to erect such building. In the first cause of action in the complaint it is claimed that plaintiff was to have, on the fulfilment of this contract, a specific sum of money, for labor and material. The second cause of action is for amount due on hardware furnished by plaintiff in the construction of the house. The third cause is for extra work, and the fourth cause is for damages for an alleged failure of defendant to perform his part of the contract at the proper time. In the answer payments were pleaded; performance of defendant's obligations alleged, as well as averments of changes in the contract, etc.; also allegations of the existence of liens for the material which were claimed to be unpaid, but which are not now disputed. There was a demand for a money judgment, and we learn, from statements of counsel, that the whole controversy was over the amount actually due from defendant to the plaintiff, as contractor, upon the claims above briefly stated.

At the opening of the trial the defendant demanded a trial by the court, claiming that the complaint and answer required the investigation of a long account, and that it was the duty of the court to withdraw this case from a jury, and hear it as the court, for

that reason. This demand the court refused, placing its refusal distinctly upon the ground that this was a case in which plaintiff was entitled to a jury trial, and that without his consent, which was not given, the court had no right to determine the issues, and deprive the other party of his constitutional right of trial by jury. This is the only error relied upon by defendant, who was defeated in the court below.

We have no doubt the trial court was right in refusing to withdraw the cause from the jury. The action was somewhat complicated, with quite a number of disputed claims for labor and material, all issues of fact to be determined, although none of them matters of an equitable character, but purely of such a nature as would, under the common-law practice, have been submitted to a jury, and as expressed by Start, C. J., in *Bond v. Welcome*, 61 Minn. 43, 63 N. W. 3:

In "an action at law for the recovery of money only, the plaintiff is entitled absolutely to a trial by jury, although it involves the examination of a long account on either side, for the constitution guaranties to him this right,"—citing *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 99 (132).

Judgment affirmed.

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GERTRUDE H. BATES v. A. E. JOHNSON COMPANY.

May 4, 1900.

Nos. 11,972—(45).

**Removal of Judgment Lien—Findings.**

In an action to remove a judgment lien from lands owned by plaintiff, but standing in the name of a judgment debtor of defendant, findings examined, and *held* to support the conclusions of law.

**Title to Land—Notice to Attorney of Creditor.**

While the time for answer is running, notice to the attorney of the judgment creditor, of the fact that lands standing in the name of the judgment debtor belong to the plaintiff, is imputable to the judgment creditor.

**Estoppel.**

Upon the facts in this case, *held*, that plaintiff is not estopped from asserting her right to the lands by the fact that she did not cause them to be transferred upon the record before the judgment against White was entered.

Action in the district court for St. Louis' county to remove the lien of a judgment from land. The case was tried before Ensign, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*Horton & Denegre*, for appellant.

*John Jenswold, Jr.*, for respondent.

**LEWIS, J.<sup>1</sup>**

This action was brought by plaintiff to remove the lien of a judgment recovered by defendant against one White from certain lands the title to which stood in the name of White, but which in fact it is claimed belonged to plaintiff, of which fact the defendant had notice. Judgment was ordered for the plaintiff, and defendant appeals from an order denying its motion for a new trial.

In substance, the court found that plaintiff was the wife of William J. Bates; that on December 15, 1896, the lands in question were the absolute property of William J. Bates, and that the title thereto stood in his name; that on that day Bates and wife conveyed the lands to White, which deed was recorded December 21, 1896; that on December 13, 1896, White executed a warranty deed of the lands to plaintiff, which deed was recorded on December 3, 1898; that from December 21, 1896, until December 3, 1898, the legal title stood in White, but he had no interest whatever in the same; that defendant, on October 5, 1898, commenced an action against White and his partner, Staberg, for the recovery of money, in which action judgment was entered by default on October 27, 1898; that the attorneys for defendant in that action were Phelps & McManus, duly licensed and doing business at Duluth; that after the commencement of the action, and before the entry of judgment therein, Bates, on behalf of plaintiff, informed Phelps, one of the attorneys, that a lot of his land stood in the

<sup>1</sup> BROWN, J., absent, took no part.

name of White, and asked Phelps what to do about it, to which Phelps replied that he could have it transferred before judgment would be entered; that Bates neglected to place the deed from White to plaintiff on record until after the judgment was entered. As a conclusion of law the court found that plaintiff was at the time of the commencement of the action the owner of the lands, and that the judgment was not a lien thereon.

Defendant insists that certain findings are inconsistent, and that the facts found do not support the conclusions of law. It is claimed that finding No. 5, to the effect that White had no title or interest in the lands, although the title stood on the record in his name, is inconsistent with No. 4, which finds that for a valuable consideration White conveyed to plaintiff; that is, if White deeded for a valuable consideration, he must have parted with something he owned. There is nothing in this whatever. It is evident from a glance that the words "valuable consideration" have reference only to the form of the deed, and not to an actual consideration. The findings in this case serve as a sample of the haste with which attorneys often prepare this important part of their work. Evidence, conclusions, and ultimate facts are all intermingled. While the findings are open to this criticism, and furnish the defendant material for an argument as to their sufficiency, we find the main ultimate facts are determined with sufficient definiteness, and no serious question is raised as to the sufficiency of the evidence to support them. The conclusions of law are supported by the findings of fact. The notice to the attorney who had the case in charge was notice to the defendant. The attorney was employed to proceed against White, and to place the claim in judgment. His authority was in no manner restricted, and it was his duty to inform his principal of all facts coming to his knowledge affecting his action as agent. The fact that the attorney had been informed that a lot of his land stood in White's name, which Bates was concerned about having transferred, was a matter directly bearing upon the effect of the judgment which the attorney was expecting to enter. *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145. See also opinion in *Trentor v. Pothén*, 46 Minn. 298, 49 N. W. 129.

But it is claimed that the finding as to the statement of Bates to Phelps was not specific and definite enough to put defendant upon notice. This part of the finding, when read in connection with the context, shows that Bates was referring to his own land, and that Phelps so understood it. It is also claimed that the plaintiff, through her husband, was guilty of laches in not placing the deed from White to plaintiff upon the record before the judgment was entered, and hence is estopped from taking advantage of his own wrong. But the doctrine of estoppel has no application to the facts. There is no evidence that defendant changed its course of action, or that it was in any manner injured or misled, by reason of the neglect to record the deed. If defendant knew, just before entering the judgment, that the lands appearing on the record in White's name were in fact not White's, it knew the same fact after the judgment was entered.

Order affirmed.

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BOARD OF COUNTY COMMISSIONERS OF MOWER COUNTY  
v. NELS ROBERTSON.

May 4, 1900.

Nos. 12,032—(175).

**Support of Indigent Sister—G. S. 1894, § 1951.**

The provisions of G. S. 1894, § 1951, which exempt a brother from the support of an indigent sister where her poverty is the result of bad conduct, do not contemplate remote acts of indiscretion, or inability of such poor person to deal wisely in business affairs, but bad conduct involving some element of moral delinquency, occasioning her poverty.

**Same—Bad Conduct.**

The bad conduct which relieves such relative from support of his indigent sister must also have an immediate bearing upon, and be the natural and proximate cause of, the poverty of such poor person.

**Same—Evidence.**

The facts that an unmarried woman has had an illegitimate child twenty-five years before she became a county charge, or that she wilfully deserted her husband ten years before such time, while during many



years subsequent she was not a pauper, are too remote to show her "bad conduct," in the sense in which these words are used in the statute.

Action in the district court for Mower county to recover \$180, being the penalty imposed by G. S. 1894, § 1951, for failure to support defendant's sister after being required by plaintiff so to do. From an order, Kingsley, J., striking out part of the answer, defendant appealed. Affirmed.

*Greenman, Dowdall & Greenman*, for appellant.

*R. E. Shepherd*, County Attorney, and *S. D. Catherwood*, for respondent.

LOVELY, J.

Appeal from an order striking out four paragraphs of the answer, which attempt to set forth a substantive defense to plaintiff's cause of action. In the court below and in this court the issue was submitted upon the sufficiency of these paragraphs to allege such a defense; and, without considering the question of practice,—whether a motion to strike out specific allegations in a pleading can in any case fulfil the purpose of a demurrer,—we will, in view of the treatment of this matter by counsel, and its disposition by the trial court, consider it upon its merits.

Johanna Johnson was the indigent sister of defendant, who, as her brother, was requested by the proper authorities to support her; the conditions being such as to require him to do so, or, in case of his refusal, to forfeit \$15 per month to the county commissioners of Mower county, unless he was relieved by reason of the fact that such sister had (upon his claim) "become a pauper from her bad conduct," according to the conditions of G. S. 1894, § 1951. The county of Mower provided for the poor person named, upon her request for relief, and sought, after a demand for reimbursement, to recover the penalty provided by statute. In the paragraphs of defendant's answer which were stricken out, defendant attempts to set forth specific facts to establish his sister's bad conduct, and upon these allegations the order of the court below was predicated. Defendant avers that twenty-five years before the date of the action his sister had an illegitimate child; that she afterwards consummated a common-law marriage with a third

party, Andrew Jacobson, and lived with him as her husband until 1888, when she wilfully deserted him; that afterwards, and until 1895, she lived with, and was supported by, her father; that her father before his death made a contract with a third party for her permanent support; and two years afterwards she became a county charge.

The pleadings were supplemented by affidavits which contest some of these matters, and attempt to show a release of such contract for the support of Johanna Johnson and her imprudence in making the same; but stripped of all embellishments in the pleadings or affidavits, which the court below considered very generously for defendant, and putting the allegations stricken out most favorably for the contention that they show bad conduct of the sister, we think they utterly fail to show such fact. They do not show how the misfortune twenty-five years before did or could affect the subsequent poverty of the sister. A common-law marriage is legal in this state. While the desertion of a woman from her husband might be relevant matter to show, in connection with other circumstances not set forth, bad conduct that resulted in indigency, still of itself it would not do so. If the poor person was seized of a valuable contract, which provided for her support, as alleged, such contract might show that she was not a poor person while she was possessed of it, but surely would not tend of itself to show bad conduct, which is its evident purpose in connection with other averments of the answer. And if, as defendant claims under the further statements in his affidavits, it appears that the poor person had mistakenly or imprudently surrendered this contract to the obligor therein for a sum less than its value, neither does this fact show bad conduct; for we have no doubt, in view of the collocation in which these words are used in the statute, that the bad conduct which is sufficient to relieve the defendant from supporting his sister must involve some elements of moral delinquency or turpitude, and also that there must be a reasonable relation between such conduct and her subsequent poverty, but the allegations in the answer which tend to such a conclusion are so remote, and so rebutted by the subsequent conditions following, as set forth in the same pleading, that they neither amount

to a substantial defense to the statutory obligations referred to, nor relieve the brother from his liability to support his sister.

The order appealed from is affirmed.

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MOLLIE GELINE EIKEN v. ANDREW EIKEN.

May 4, 1900.

Nos. 12,107—(82).

**Support of Stepchildren not Gratuitous.**

Where the stepfather has charge of the family, and the mother's children are provided for by both father and mother, there is no presumption that such support is gratuitous on his part. *Unke v. Dahlmier*, 78 Minn. 320, followed.

**Findings Sustained.**

Evidence considered, and held amply sufficient to support the findings of the trial court; also that the findings of fact sustain the conclusions of law.

From an order of the probate court for Polk county made on the final account of Andrew Eiken, as guardian of Mollie Geline Eiken, a minor, the ward appealed to the district court for said county. In the district court the appeal was heard before C. L. Brown, J., who made findings, as stated in the opinion, and ordered that the order of the probate court be reversed, and the guardian be discharged from further liability. From an order, Watts, J., denying a motion for a new trial, the ward appealed. Affirmed.

*Ole J. Vaule*, for appellant.

*R. J. Montague*, for respondent.

**LOVELY, J.<sup>1</sup>**

This controversy arises upon an order of the district court on a hearing of an appeal from the probate court made upon a guardian's account, in which the conduct of such guardian and his entire management of the ward's estate were fully investigated, and determined in his favor by findings of the trial judge. As we

<sup>1</sup> BROWN, J., having when district judge heard the case, took no part.

view the questions presented on this appeal, it only becomes necessary to inquire whether the finding of the trial court is supported by the evidence.

It appears that defendant, who was the uncle of appellant, was appointed her guardian, upon the death of her father; but soon after, believing it would best subserve the interests of the child, placed her in the charge of one Christianson, who had married her mother subsequent to her father's death. For six years or more, Christianson and her mother had charge of the child, with the consent of the defendant guardian, and undoubtedly for the child's best interests. Christianson and the mother also had actual control of the ward's property and its assets until Christianson died, and the mother was appointed her guardian in place of defendant, and now joins with the ward in questioning the disposition of so much of the estate as has been used—very much of it for the child by her mother and the husband. The guardian claims, under the proofs, that against the attempt to charge him with the appropriation of the ward's property he may offset a reasonable claim for her maintenance, and for expenditures upon her estate, made by the Christiansons, as his agents, for the support of his ward, and to benefit her property. We think there is no doubt as to the right of the guardian to have his account settled by making proper charges for her support against the amount of the child's property, which the stepfather had, and used, presumably, for her benefit, while taking care of her. In such a case the stepfather is the head of the family, and, although he and the mother take care of the children, there is no presumption that such support is gratuitous on his part. *Unke v. Dahlmier*, 78 Minn. 320, 80 N. W. 1130.

There was ample evidence to sustain the findings of the trial court to the effect that the charges and claims made by the guardian were reasonable, and were rightfully allowed.

There is no merit in any further assignments of error, and the order appealed from is affirmed.

STATE v. E. R. WARD.

May 4, 1900.

Nos. 12,225—(267).

**Taxes—Laws 1899, c. 322—Unverified Answer.**

Under Laws 1899, c. 322, where the party defending against the "clearing-up" proceedings to enforce prior tax liens by a new judgment files his answer in court as required by law, it should be verified. But the court may, in its discretion, upon cause shown, relieve such defendant from his omission to do so, and allow the answer to be filed before hearing.

**Tax Judgments—Statute of Limitations.**

Under the chapter referred to, all judgments prior to 1898, on which the statute of limitations has not run, are to be included in the delinquent list provided for in that law.

**Defenses to Tax Judgments.**

The tax judgments included in such delinquent list are only open to such defenses in the new proceeding as would have applied to the judgments before the statute was enacted.

**Statute of Limitations.**

The statute of limitations applicable to judgments, instead of enforceable tax burdens for the original taxes, applies necessarily in cases where, as held in this case, prior tax judgments are to be included in the new judgment.

**Sheriff—Mileage.**

Where several notices under the statute of 1899 are served by the sheriff upon one person, who is the occupant of several tracts,—all notices being served at the same time,—the officer is entitled to full mileage upon each notice served.

In proceedings in the district court for Scott county, under Laws 1899, c. 322, to enforce payment of taxes prior to the year 1897 on certain land, E. R. Ward interposed an answer, and the matter was tried before Cadwell, J., who ordered judgment against defendant for the year 1893 only, with penalties, costs, and disbursements. Reversed.

On application of the county, the court certified to the supreme court for its determination the following points:

First. Is it necessary that an answer, filed in proceedings under Laws 1899, c. 322, should be verified? If so, may the court permit the answer to be verified after the time for answering has expired, and pending a motion on behalf of the county to strike out the answer filed on the ground that it is not verified?

Second. In proceedings under said chapter, is evidence of excessive assessment competent, where a prior judgment has been regularly entered against the land for the full amount of the tax claimed?

Third. In proceedings under said chapter, has the statute of limitations run against the claim of the state and county for the amount of the tax, in cases where judgment has been duly recovered against the land for the tax more than six years and less than ten years prior to the institution of the proceedings under said act, and where under such judgment the land has, at the tax sale, been duly bid in for the state?

Fourth. Is the sheriff entitled to mileage upon each notice served upon the occupant, under section 3 of said act, where the same person is occupant of several tracts and a separate notice for each tract is served, all notices being served at the same time?

*W. B. Douglas*, Attorney General, and *W. N. Southworth*, County Attorney, for plaintiff

These proceedings are purely statutory, and in all such proceedings the provisions of the statute must be strictly followed. In the absence of a statutory regulation, the procedure in actions to enforce the collection of taxes is governed by the rules applicable to ordinary actions; but when the procedure is regulated by statute, it must conform thereto. 25 Am. & Eng. Enc. 319.

Under the second and third points counsel cited the following cases: *Farnham v. Jones*, 32 Minn. 7; *Gilfillan v. Chatterton*, 38 Minn. 335; *Mulvey v. Tozer*, 40 Minn. 384; *Pine Co. v. Lambert*, 57 Minn. 203; *Kipp v. Elwell*, 65 Minn. 525; *Cool v. Kelly*, 78 Minn. 102. In these cases, it was not necessary to decide, and the court has not decided, that in these "clearing-up" acts the state waives anything more than its title to the land under the prior proceedings; and the question as to whether the prior judgments were waived is an

open one. See also *State v. Bellin*, supra, page 109. The sole object of Laws 1899, c. 322, like that of the preceding acts, was to collect the amount of unpaid taxes by enforcing the state's lien upon the land. The intent of the legislature must be construed as consistent with this object, unless the language used is such as to force a contrary construction. In examining the act it is fair to presume that the legislature understood the elementary principles of law. It is beyond the power of the legislature to revive a right which has been lost or extinguished. *Pine Co. v. Lambert*, supra. In all cases where a valid judgment has been entered against land for a delinquent tax, the claim for such tax is merged in the judgment. 15 Am. & Eng. Enc. 336, 337. See also *Chauncey v. Wass*, 35 Minn. 1; *Countryman v. Wasson*, 78 Minn. 244. As to the sheriff's fees, see *Steenerson v. Board of Co. Commrs.*, 68 Minn. 509.

*F. C. Irwin*, for defendant.

Under the second point counsel cited: *Chauncey v. Wass*, 35 Minn. 1; *County of Redwood v. Winona & St. P. L. Co.*, 40 Minn. 512; *County of Chisago v. St. Paul & D. R. Co.*, 27 Minn. 109; *Gage v. Pumpelly*, 115 U. S. 454. Under the third point counsel cited: *Cool v. Kelly*, 78 Minn. 102; *Pine Co. v. Lambert*, 57 Minn. 203; *Kipp v. Elwell*, 65 Minn. 525; *Mulvey v. Tozer*, 40 Minn. 384; *State v. Baldwin*, 62 Minn. 518; *McHenry v. Kidder Co.*, 8 N. D. 413; *Cooley, Taxn.* 449; *San Francisco v. Jones*, 20 Fed. 188.

LOVELY, J.

This cause arises under Laws 1899, c. 322, which was enacted to provide for a clearing up of delinquent taxes remaining unpaid for prior years, upon which the statute of limitations had not run. This cause was recently heard, but has been certified to this court for review upon several propositions involved therein, under G. S. 1894, § 1589, because, in the opinion of the trial court, the points were of great public importance, and likely to arise frequently.

Generally stated, the proceedings under Laws 1899, c. 322, § 2, adopt the system of practice in vogue for the collection of taxes by judicial process; bunching the taxes of the different years prior

thereto against a particular tract, and returning the same, as in other cases, into the district court, where

"The same proceedings shall be had with reference to advertisement, judgment and sale of the property described in such forfeited lists, as are required by the general tax law for advertisement, judgment and sale of property described in the regular delinquent list [of the current year], but separate tax judgment \* \* \* books shall be provided for the forfeited lists."

Upon proceedings to enforce payment of taxes in the regular list, any person, etc., having an interest may, at the time provided for in the statutes, "file in the office of the said clerk [of district court] an answer, verified as pleadings in civil actions, setting forth his defense or objection to the tax," etc. G. S. 1894, § 1584. In this case an answer was filed in time, but was not verified. Upon the call of the calendar, the facts having been agreed upon, the trial court held that such omission of the landowner to verify his answer might be cured by a verification to be then made, and relief was accordingly granted to cure such omission. We see no reason for making an exception to the general rule provided for in G. S. 1894, § 5267, authorizing courts, in the exercise of sound discretion, to relieve against mistakes, and extend time for the performance of formal acts, or to allow such acts to be done, after the time limited by law. This discretion was applied in this case, there is no reason to doubt that it was wisely exercised, and the action of the trial court is sustained in that respect.

The answer having been verified, the defendant contested the validity of the taxes for the years 1888, 1889, 1890, 1892, and 1893. As the taxes of each of these years became delinquent, proper proceedings were instituted, a judgment for the tax of each of such years was entered against such land, and judgments duly entered thereon, under the forms provided by law. In each case the land was bid in by the state. Defendant alleged in his answer that the assessment for each of these years was unfair, and largely exceeded the actual value of the property; and it was stipulated that such was the fact, if it was "competent to show the same in this proceeding." The trial court held that as to the year 1893 the limitation had not run, but that upon the prior years the statute had



run, and that for the tax of 1893 no evidence was admissible to show that the assessment was for more than the value of the property, and ordered judgment accordingly; but held further that as to the taxes of 1889, 1890, and 1892 the statute had run, and that taxes for any such prior years could not be included in the judgment provided for in the "clearing-up" proceedings under Laws 1899, c. 322.

Briefly stated, the court below held the view that the statute of limitations applicable to judgments, extending their validity to ten years, did not apply, and that the years prior to 1893 must be excluded from the new judgment, because they were simply enforceable tax burdens, and would be barred in six years.

This leads to the real question in this controversy, which may be expressed briefly in the proposition whether the statute of 1899 intended to recognize the validity of tax judgments previously rendered, or only to provide for a new action on the original taxes, excluding from the clearing-up provisions adopted by the law of 1899 all the judicial proceedings by which the former judgments were secured. To further abbreviate the real point involved, does the provision in section 1 of the Laws of 1899 which directs that the "auditor of each county shall make out and append to such delinquent list [of the current year] a list of all taxes upon real estate in the county which appear to have become delinquent" in the year 1897, or any prior years, etc., which are unpaid and unsatisfied, relate to the perfected judgments, or only to the original taxes, considered as distinct from such judgments?

A literal reading of this section, as well as of the whole law, does not determine this question, and involves the subject in perplexity, calling for construction. Chapter 322, it is true, provides for a list of prior taxes, and it is urged that the word "taxes" cannot, in legal conception, embrace tax judgments; that the word "taxes," *ex vi termini*, excludes the judgments, into which such tax has ripened. We cannot take this limited view of its use. It is certainly not the popular understanding of its meaning. A taxpayer wishing to pay up back taxes or to inquire, for any purpose, what was due upon a piece of land to the state, would uniformly speak of such liens as taxes; and the very title of chapter

11 of the General Statutes, in which the provisions of law for obtaining judgments are included, has only the significant title "taxes." Again, section 3 of the act of 1899, which contains provisions clearly intended for a commutation, to some extent, as a consideration for payment before the new judgment is entered, provides that before the sale the landowner may pay a less sum than the amount of the judgment; and it is in this particular instance, and nowhere else in this law, that any reference is made to the "original taxes" in terms, and this as a basis only of settlement and commutation, to avoid the severe consequences of a judgment without redemption.

It seems somewhat significant that the words "original taxes" should have been used in this connection, and no other, if the legislature intended to distinguish between the acquired judgment liens of the state and the taxes upon which the same were entered. The difficulty suggested is not very much helped by any previous decision of this court. In several cases which have been here the distinction between "original taxes," as such, and judgments entered therein, has been noticed. *Pine Co. v. Lambert*, 57 Minn. 203, 58 N. W. 990; *Kipp v. Elwell*, 65 Minn. 525, 68 N. W. 105; *Cool v. Kelly*, 78 Minn. 102, 80 N. W. 861. But no adjudication has been made that is useful in the case at bar, further than to suggest that the judicial recognition of the difference suggested was brought to the attention of the legislature, and that the inference would follow that, if the lawmakers had intended to give up any rights which the state possessed, they would have done so in clear and unambiguous terms, to avoid doubt, and perhaps as an inducement to the landowner to aid the revenues of the state by accepting the provisions for commutation.

We think, after all, that the legislative intent must be derived finally from a consideration of the objects of the statute, in connection with the means which it adopts to accomplish the desired result. The object of the statute was unquestionably to obtain for the state and the different funds for which it is the trustee the unpaid revenues belonging to it. This goes upon statement. And it is almost as obvious that it was not the purpose of the legislature to surrender any substantial revenues, securities, or rights which

it possessed, for such a surrender would defeat the object of the law; and that the limited view of the defendant and the order under review would have such effect seems to us apparent. If the judgments are valid, and embraced, in a general and broad sense, by the word "taxes," in the statute, the state will, if the law is practically successful, have the benefit of such judgments for ten years; otherwise, the legislature has sacrificed unnecessarily four years of substantial obligations and enforceable tax liens. It has also sacrificed the costs involved in the judicial proceedings to obtain such judgments, where the commutation benefits are not accepted. And in cases where the intermediate steps to collect the original taxes are defective, and for that reason the taxes are invalid, it has given up the benefit of the judgment, with all that it implies. And, further, where the taxes are valid in all respects, and the best reason exists for their enforcement, they, having been merged in the judgment, are, as a legal result of the elementary and well-known principle that affects the doctrine of merger, extinguished by the voluntary nullification of the judgment on the part of the state, whereby the claim for the taxes themselves is embraced and merged in the judgment, 1 Freeman, Judgm. § 215, which is entirely abandoned, and the statute absolutely defeats its own purpose, and gives away that which it seeks to secure. We need not pursue the matter further.

We cannot and must not assume that the legislature, in adopting a statute to accomplish a beneficent purpose, by a dubious use of words intended to give away and release the better part of its substantial possessions, and thus defeat the very end it intended to accomplish. We hold that the court below erred in its ruling upon this question, and that the tax judgments for ten years were intended to be embraced in the new proceeding for clearing up the delinquent taxes of previous years, and were not barred by any other limitation than that which applies distinctively to judgments.

Upon the further question submitted, viz., whether the sheriff is entitled to mileage upon each notice served upon the occupant of the lands, under Laws 1899, c. 322, § 3, where the same person is occupant of several tracts, and a separate notice for each tract is

served, all notices being served at the same time, a majority of the court are of the opinion that the proceeding against each tract is of a distinct character, separate from proceedings under the law against any other tract, in the same way and to the same extent that a service of summons or process in one legal action is distinct and separate from any other, and that the sheriff was entitled to full mileage on each notice served.

To the first question we answer: The pleading should be verified, but the court may, in its discretion, permit it to be verified after filing, as in this case.

To the second question we answer: No.

To the third question we answer: No; the statute of limitations runs upon the judgment, instead of the original tax liens, and the claim of the state is not barred until ten years from the rendition of the same.

To the fourth question we answer: Yes; the sheriff was entitled to mileage, under the circumstances as stated, upon each notice.

The order of the court below is reversed, and the case is remanded for further proceedings in accordance with the views expressed in the opinion.

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C. C. REID and Others v. NORTHWESTERN IMPLEMENT & WAGON  
COMPANY.

May 7, 1900.

Nos. 11,939—(71).

**Offer to Purchase on Condition—Acceptance.**

A written order, addressed to a party, and directing a shipment of goods, such order being "subject to approval at your office," is nothing more than a conditional offer to purchase. To become a valid enforceable contract, it must be approved or accepted by the party to whom it is addressed, and the party signing the same must be notified of the approval or acceptance within a reasonable time.

**Evidence of Acceptance Insufficient.**

In the case at bar there was no formal approval or acceptance of the order. *Held*, that certain acts on the part of the officers of the corpora-

tion to whom the order was addressed, and a conversation with one of the officers, were insufficient to show approval or acceptance.

Action in the district court for Hennepin county to recover \$2,700, and interest, damages for breach of contract. The case was tried before Harrison, J., who, at the close of plaintiffs' testimony, granted defendant's motion to dismiss the action. From an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

*F. D. Larrabec*, for appellants.

*Wilbur F. Booth*, for respondent.

COLLINS, J.

For one reason, at least, the plaintiffs could not recover in this action, and therefore the court below was fully justified in dismissing the cause when plaintiffs rested. The written order addressed to defendant corporation, signed by two of the plaintiffs, and delivered to defendant's traveling salesman, contained the following plain language:

"Please ship us on July 1, 1898, or as soon thereafter as possible, the following order, subject to approval at your office."

This order was for 45,000 pounds of binding twine, four distinct grades being specified, at prices ranging from 5½ to 7 cents per pound, the value aggregating over \$2,700. This writing was merely a conditional offer to purchase the twine at the prices named if the proposition was satisfactory to defendant, and was approved or accepted by it at its office, and this approval or acceptance communicated to plaintiffs within a reasonable time. To constitute a valid contract of sale, it is always essential that the parties mutually assent to its terms. An offer to sell or to buy does not become a contract until it is approved or accepted unconditionally, and upon its exact terms, by the other party. *Ames & Frost Co. v. Smith*, 65 Minn. 304, 67 N. W. 999, and cases cited; *Leake*, Cont. c. 1, § 1, par. 2. And in this case, approval or acceptance at defendant's office, not by its salesman, was expressly made a condition of the order, and, until such approval or acceptance, there was no contract.

But counsel for plaintiffs contends that by certain acts of its officers the defendant approved and accepted the order, and became bound to ship the twine. Putting aside all question of the necessity, under the statute of frauds, of an approval or acceptance by defendant in writing, it is obvious that the acts relied on were wholly insufficient, and fall far short of establishing what is claimed for them. When the order was sent by the salesman who received it, the defendant mailed a letter to the firm, of which the two plaintiffs who signed were members, inclosing an acknowledgment that the other plaintiff, who had not signed, was one of the firm, and a guaranty on his part that all "contracts" made by his associates on that particular day should be faithfully performed. This paper was signed by the plaintiff last referred to, and then sent to defendant. What were the contents of the letter from defendant was not shown. Soon afterwards copies of the order and the acknowledgment and guaranty were forwarded by defendant to plaintiff firm, the originals being retained. This is one of the acts relied on. In May plaintiffs wrote to defendant, asking for prompt shipment of the twine, but the defendant, in an immediate reply, very clearly indicated that it had not approved or accepted the order, and did not intend to. Fifteen days later plaintiffs again inquired by mail as to defendant's intentions, but there seems to have been no answer to this communication.

The plaintiffs cannot and do not depend on these letters, but do contend that in a certain conversation between two of the plaintiffs and defendant's president the written order was approved and accepted. According to plaintiffs' testimony, defendant's president said, when asked about delivering the twine, that

He "had ten thousand pounds of his own that he would give us; that is all he had, but he knew where there was ten or twelve thousand more, and he would get it, and send it, and, if he could get the rest of the twenty-five thousand, he would get that, and send it."

If this proved anything at all, it was that defendant's president refused to recognize the order, or to ship any twine in accordance with its terms, and this was made evident later on, when it appeared from the testimony that cash was to be paid for whatever

was sent, while under the original order plaintiffs were to have time for payment until November 1. And, again, this conversation related to twenty-five thousand pounds only, while the order was for nearly twice that amount. Retaining the order, securing the assent of the third member of the firm to it, and then forwarding copies to plaintiffs, together with the conversation, cannot be held an approval or acceptance. *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125; *Ames & Frost Co. v. Smith*, supra; *Thompson v. Perkins*, 97 Iowa, 607, 66 N. W. 874. The conditional offer in writing was expressly subject to the approval of the defendant company, and until there was such approval, or an acceptance which was equivalent to approval, there was no contract, and neither party was bound. The evidence failed to show approval or acceptance, verbal or otherwise, and plaintiffs could not recover damages for alleged breach.

Order affirmed.

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DANIEL G. PARKER v. MINNEAPOLIS & ST. LOUIS RAILROAD  
COMPANY.

May 7, 1900.

Nos. 12,017—(49).

**Pleading—Meaning of Word "Owner."**

The word "owner" includes any person who has usufruct, control, or occupation of real estate, whether his interest in it is an absolute fee, or an estate for years under a lease. A tenant for a term of years is an owner of the property, within the general or popular meaning of the word, and he may properly allege himself to be the owner in a complaint in an action of ejectment brought against his landlord.

Action in the district court for Freeborn county for the recovery of real estate. The case was tried before Kingsley, J., who directed a verdict in favor of plaintiff. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Albert E. Clarke*, for appellant.

*H. H. Dunn*, for respondent.

COLLINS, J.<sup>1</sup>

It was perfectly proper in this action in ejectment for the plaintiff to allege in his complaint that he was the owner of the real property in question. The word "owner" includes any person who has usufruct, control, or occupation of real estate, whether his interest in it is an absolute fee, or an estate for years under a lease. 17 Am. & Eng. Enc. 299, and citations. The plaintiff was a tenant for a term of years, and this term had not expired when the defendant wrongfully dispossessed him, according to the allegations in the complaint. There was no inconsistency between the allegations as to ownership in the pleading, just mentioned, and the reply, wherein plaintiff admitted that he was defendant's tenant, as alleged in the answer. Nor was there any variance. The action was brought to recover possession of real property, and, to maintain it, a possessory title was all that was needed. The court below ruled correctly, and the case of *Merrill v. Dearing*, 47 Minn. 137, 49 N. W. 693, relied on by counsel for defendant, is not at all in point.

Order affirmed.

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STATE v. JOHN P. NELSON.

May 7, 1900.

Nos. 12,095—(19).

**Embezzlement—Pleading Ownership of Property.**

The same rules with reference to the property embezzled and the ownership thereof apply in cases of embezzlement as apply in cases of larceny. Unless the pleader is released from this exactness by special statute, the goods and the ownership must be set out in the indictment and proved with the same exact completeness as in larceny.

<sup>1</sup> LOVELY, J., having been of counsel, took no part.



**Embezzlement by Assignee—Allegation of Ownership in Assignor in Insolvency—Demurrer.**

In an indictment for an embezzlement it was alleged that the defendant had appropriated and embezzled a stated sum of money which came into his possession as the assignee of one Peterson, who had made an assignment to defendant for the benefit of his creditors under the statute. It was also alleged positively that said Peterson was the owner of the money when so embezzled, and there were no further allegations as to the ownership. *Held*, that the court erred in overruling a general demurrer to the indictment.

John P. Nelson was indicted in the district court for Hennepin county for grand larceny in the second degree, committed as stated in the opinion. The court, Simpson, J., made an order overruling a demurrer to the indictment, and at the request of defendant reported to the supreme court certain questions for its determination. *Reversed*.

*George H. Fletcher*, for defendant.

The indictment states specifically that the money appropriated was the property of Peterson. If it was the property of Peterson, it was not held by Nelson under the terms of his appointment as assignee. In anything that Nelson held as assignee, Peterson could have no possible ownership, interest, or title. *Langdon v. Thompson*, 25 Minn. 509; *Donohue v. Ladd*, 31 Minn. 244; *Williamson v. Selden*, 53 Minn. 73; *Buffington v. Harvey*, 95 U. S. 99; *Bank v. Sherman*, 101 U. S. 403, 406. The indictment thus charging, upon its face, an ownership of the funds charged to have been appropriated inconsistent with the trusteeship charged is fatally defective, and the demurrer should have been sustained. The ownership of the funds is an essential averment. *State v. Lyon*, 45 N. J. L. 272, 274; *Livingston v. State*, 16 Tex. App. 652, 656; *State v. Collins*, 4 N. D. 433.

*W. B. Douglas*, Attorney General, *C. W. Somerby*, Assistant Attorney General, and *Louis A. Reed*, County Attorney, for the State.

The deed reserved to the assignor a reversionary interest, and the assignor has further an interest in the estate to the extent of having the proceeds applied so far as possible to the discharge of

his debts. A bankrupt's interest in his estate is not extinguished by an assignment in bankruptcy proceedings. *King v. Remington*, 36 Minn. 15; *Wendell v. Lebon*, 30 Minn. 234; *First Nat. Bank v. Randall*, 38 Minn. 382; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; *Burrill, Assign.* (5th Ed.) § 206; 2 *Bishop, Crim. Proc.* §§ 339, 343; *People v. Hill*, 3 Utah, 334. It is sufficient to lay in the assignor the ownership of the property, belonging to the insolvent estate, which has been embezzled. The ownership must be proved to be in some other person than the accused, and an indictment which lays the property in any person other than the accused, is sufficient in that respect. *State v. Kent*, 22 Minn. 41; *State v. Kusnick*, 45 Oh. St. 535; G. S. 1894, §§ 7245, 7263; *State v. Grimes*, 50 Minn. 123; *People v. Prather*, 120 Cal. 660; *State v. Barry*, 77 Minn. 128.

COLLINS, J.

Defendant was indicted under the provisions of G. S. 1894, § 6723, for appropriating to his own use money coming into his possession as the assignee of Andrew G. Peterson, who had made an assignment for the benefit of his creditors under the statute. The deed of assignment was set out in full in the indictment, and immediately following it was a purported acceptance by defendant. Although it was not alleged directly that the defendant accepted and qualified under the deed of assignment, the indictment charged that he was duly appointed and employed as a trustee, and was then and there acting as such; and that by virtue of his appointment and employment he then and there had in his possession the sum of money specified as having been appropriated and embezzled by him. The indictment further charged that the money so appropriated was the property of said assignor, Andrew G. Peterson, and that the latter was the owner thereof. The court below overruled a general demurrer to this indictment, and thereupon certified to this court three questions for its determination.

The second question, briefly stated, is this: Does it appear that the defendant has committed the offense charged, upon the facts stated in the indictment, it being positively alleged that Andrew G. Peterson was the owner of the money, while upon its face the

indictment clearly shows that the money appropriated was part of the trust funds which had come into defendant's possession under and by virtue of the deed of assignment, and in which Peterson had no title, except in case there was a surplus to revert to him?

It has been universally held that the same rules with reference to the property embezzled, and the ownership thereof, and the fraudulent intent to convert the property apply in cases of embezzlement as apply in cases of larceny. Unless the pleader is released from this exactness by special statute, the goods and ownership must be set out in the indictment and proved with the same exact completeness as in larceny. 1 Wharton, Crim. L. § 1044; 1 McClain, Crim. L. § 653. See also *State v. Collins*, 4 N. D. 433, 61 N. W. 467; *State v. Lyon*, 45 N. J. L. 272; *Livingston v. State*, 16 Tex. App. 652. We have no statute which changes this rule.

It is obvious from the indictment that Andrew G. Peterson was not the owner of the money alleged to have been embezzled. It is true, his interest in his estate was not extinguished by the assignment, but that is of no consequence with the indictment in the present form. As the assignee of Peterson, the defendant was the trustee of an express trust. As such trustee, he held the legal title to the money which came into his hands, and he also held the equitable interest of the assignor in respect thereto. *Langdon v. Thompson*, 25 Minn. 509; *Donohue v. Ladd*, 31 Minn. 244, 17 N. W. 381; *Williamson v. Selden*, 53 Minn. 73, 54 N. W. 1055. He was the only party who could have maintained a civil action concerning, or to recover, this money. Peterson simply had a reversionary interest in all of the property assigned, and he was entitled to have the proceeds applied, as far as possible, in the discharging of his debts. Although his interest was not altogether extinguished, it is very clear that his ownership could not have been established at the trial in the absence of an allegation to the effect that the estate had been fully administered, and a surplus remained, which, in fact, was his. Although not directly in point, see *State v. Farrington*, 59 Minn. 147, 60 N. W. 1088. The court below erred when it overruled the demurrer.

Order reversed, case remanded.

## F. A. GILMAN v. CORA MAUD MAXWELL.

May 7, 1900.

Nos. 12,127—(74).

**Estate of Decedent—Presentation of Claim to Probate Court—Waiver of Statute.**

Claims against the estate of a deceased person, founded on contract, must be presented to the probate court for allowance, in accordance with G. S. 1894, §§ 4509, 4511. It is not within the power of an administrator to waive compliance with the statute, pay a claim, himself, and then, long after the same has been barred, present it as a debit item in his final account, and have it allowed by the court.

**G. S. 1894, § 5912—Claim in Tort Does not Survive.**

What course is to be pursued if a claim against an estate is founded in tort in order to secure its payment out of the funds in the hands of an administrator is not decided. Nor is the exact nature of the claim in question determined, but it is held that, if in tort, it must have been based on an injury to the person of the original claimant, and under the statute (section 5912) the cause of action died with the person of the deceased party.

**Advances to Daughter—Findings.**

*Held*, that certain findings of fact in respect, and adverse, to the claim made by the administrator that certain money and property had been "advanced" by the deceased in his lifetime to one of his daughters were supported by the evidence.

**Costs and Disbursements upon Appeal to District Court.**

*Held*, that the district court erred in one of its conclusions of law wherein it ordered judgment against the administrator for the respondent's costs and disbursements.

In the matter of the estate of Michael Burns, deceased, pending in the probate court for Hennepin county, F. A. Gilman, administrator, appealed to the district court for that county from an order disallowing certain items of his final account. In the district court the appeal was heard upon issues raised by appellant's complaint and the answer of Cora Maud Maxwell, one of the heirs at law of the decedent, before Elliott, J., who ordered judgment modifying the order of the probate court. From an order deny-

ing a motion for a new trial and for modification of the findings of fact and conclusions of law, the administrator appealed. Modified.

The sixth finding of fact, referred to in the opinion, was as follows: "That in 1894, prior to the death of said Michael Burns, one Amy Foster made a claim against him for damages in tort, claiming that he had slept with her and was entitled to and demanded \$5,000, whereupon it was agreed by and between said Amy Foster and Michael Burns that she should be paid \$500 from the estate of a brother of said Michael Burns, from whom he expected some money, and that said sum should be accepted in full of her claim against him, said Michael Burns."

*H. F. Woodard*, for appellant.

*Lewis E. Stetler*, for respondent.

COLLINS, J.

When appellant presented his final account as administrator of the estate of Michael Burns, deceased, to the probate court, certain items thereof were disallowed, and from the decree entered he appealed to the district court. The probate court had wholly rejected his claim of \$350 as compensation for his services, and on appeal he was awarded \$250 in full for such services. To this extent only was he successful in district court, and thereupon he appealed, claiming that the court erred in rejecting and refusing to allow other items, which items we will consider in detail.

1. The district court refused to allow what is known as the "Amy Foster claim of \$250," which appellant alleged he had paid to Miss Foster out of his own money, and before any of the trust funds came into his hands. This claim was never presented to the probate court for allowance until December 15, 1898, at which time it appeared as a debit item in appellant's final account. This was nearly two years after notice to file claims within six months had been duly given to all creditors, under the provisions of G. S. 1894, § 4509. If this claim was founded on contract, it should have been presented to the probate court for adjustment and allowance within the statutory period. Claims founded on contract must be so presented, or be forever barred. Section 4511. It is not within

the power of the administrator of an estate to waive compliance with the statute, and the authorities cited by appellant are not in point, because of this mandatory statute.

But appellant seems to take the position that the Foster claim sounded in tort, and for that reason the statute has no application, citing *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583, in which it was held that the statute governs only when claims arising on contract are involved. From the sixth finding of fact, wherein is stated the nature of the Foster claim, it is somewhat difficult to determine just where it should be located among the torts. We cannot readily classify it, and shall not try, referring the curious to the finding itself for further information as to its character. We are content with the statement that, if any injury resulted to Miss Foster by reason of the transaction mentioned in the finding, and on which her claim for damages was based, it must have been, in the nature of things, an injury to her person; and under the statute (section 5912) her cause of action died when Burns departed this life, apparently forgetful of the claim the lady had asserted in his lifetime,—according to the appellant's testimony,—and, unfeelingly and ungratefully, failing to make provision for its liquidation,—a clear case of "man's inhumanity to" woman. The court below was right when it rejected the Foster claim or claim.

2. The court found against the administrator upon his claim that the deceased had in his lifetime "advanced" to his daughter, the late Mrs. Robinson, money or property in a certain amount or value; and the finding is abundantly supported by the evidence. It follows that we are not required to construe or apply the statute (section 4648) on gifts and grants made in advancement or by way of advancement.

3. We have already stated that the appellant was successful on appeal to the extent of \$250, allowed him for his services as administrator. But, notwithstanding this, the district court included among its conclusions of law one to the effect that the respondent should have and recover judgment against the appellant for her costs and disbursements. This was error. On the present respondent's written objection to the allowance the probate

court rejected the appellant's claim for compensation for his services as administrator, and refused to allow him any part of his bill for such services. On appeal he was the prevailing party, and was entitled to his disbursements at least. Section 4677.

The order appealed from is reversed, with instructions to the lower court to amend its third conclusion of law in accordance with the views herein expressed, the remaining conclusions of law to stand. No statutory costs will be taxed against respondent in this court.

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BOARD OF COUNTY COMMISSIONERS OF COOK COUNTY  
v. WILLIAM FISHER and Others.

May 8, 1900.

Nos. 11,958—(64).

**Salary of County Auditor—G. S. 1894, § 720.**

Under G. S. 1894, § 720, in counties where the valuation of taxable property does not exceed the sum of \$1,500,000, the salaries of county auditors are computed upon the following basis: Six mills on each dollar of the first \$100,000, and one mill on each dollar of all amounts in excess of \$100,000 up to \$200,000 of such excess, and one-third of one mill on each dollar on all amounts in excess of said last-named sum. *County of Mower v. Williams*, 27 Minn. 25, followed.

Action in the district court for St Louis county against William Fisher, county auditor of Cook county, and Edward F. Patterson and E. R. Jefferson, sureties on his official bond, to recover the sum of \$133.39, alleged to have been drawn out of the county treasury by said Fisher in excess of his salary for the years 1892 and 1893. A second action was also brought by the same plaintiff against Fisher and his sureties to recover the sum of \$127.53, alleged to have been drawn out by him in excess of his salary for the years 1896 and 1897. From orders, Cant, J., sustaining a demurrer to the complaint in each action, plaintiff appealed. **Affirmed.**

*L. U. C. Titus*, for appellant.

*Baldwin & Baldwin*, for respondents.

LEWIS, J.

G. F. 1894, § 720, provides for the salaries of county auditors, and, as to the material facts now under consideration, reads as follows:

"The salary of the county auditors shall be regulated by the value of the property in their respective counties, as fixed by the state board of equalization for the preceding year, as follows: In counties where the amount of taxable property does not exceed the sum of one and one-half million dollars, they shall be entitled to receive six mills on each dollar of the first one hundred thousand dollars, and one mill on each dollar of all amounts in excess of said last-named sum, and less than two hundred thousand dollars, and one-third of one mill on each dollar on all amounts in excess of said last-named sum. In counties where the value of the taxable property for the preceding year, as fixed by the said board of equalization, exceeds the sum of one and one-half million dollars, the county auditor shall be entitled to receive five mills on each dollar of the first one hundred thousand dollars, and one-half of one mill on each dollar of all amounts in excess of said sum and less than two million dollars, and one-fifth of one mill on each dollar of all sums in excess thereof."

The defendant William Fisher was county auditor of Cook county during the years 1893 and 1894. The value of the taxable property in Cook county, as fixed by the state board of equalization for the year 1892, was \$724,818, and for 1893 the value of the property so fixed was \$760,870. The complaints charge that upon this valuation the auditor's salary for 1893 was \$874.94, and for 1894 was \$886.96. That he drew out of the county treasury \$941.62 as his salary for 1893, and \$953.67 as his salary for 1894; and judgment is demanded against the auditor and his bondsmen for the excess of \$133.39. Defendants demurred to the complaints upon the ground that they do not state facts sufficient to constitute a cause of action, and plaintiff appeals from an order of the district court sustaining the demurrers.

This statute was construed by this court in the case of *County of Mower v. Williams*, 27 Minn. 25, 6 N. W. 377, the court there having under consideration that branch of the section referring to salaries based on a valuation in excess of \$1,500,000, and it was there held that the words "less than two million dollars" were intended to limit the amounts of the excess over the first \$100,000,



and that the auditor in that case was entitled to compute his salary as follows: Five mills on the first \$100,000, and one-half of one mill on the excess of \$100,000, which excess should not exceed \$2,000,000. In the case before us the auditor computed his salary at six mills on \$100,000, and one mill on \$200,000 in excess of the \$100,000, and one-third of one mill on the excess of the last-named amount. Appellant claims that the computation should have been as follows: Six mills on the first \$100,000, and one mill on the next \$100,000, and one-third of one mill on the excess of the last-named amount. A free and natural reading of this language would seem to lead to the construction as contended for by appellant. It is not the plainest way to put it, but the limitation naturally applicable to the words "and less than two hundred thousand dollars" is that the one mill shall apply to no amount in excess of that amount. If the matter were before us for the first time, we should be inclined so to construe this language. But there is room for argument upon the other side. If the legislature intended to say that the one mill shall not apply to an amount in excess of \$200,000, why was it not so stated in direct words, instead of using the words "and less than two hundred thousand dollars"? Again, it is something of an effort to keep the mind from reading in and connecting with the words of limitation the words "of such excess," as the court did in the opinion in *County of Mower v. Williams*, *supra*.

While admitting that the decision referred to was probably wrong, yet it has stood as the law of the state for twenty years. It has been accepted as such in computing the salaries of county auditors. The legal advisers of the state and counties have accepted it as the law. The legislature has not seen fit to change it, although other parts of that section have been amended, and we are of the opinion that, if overruled, hardship would follow in subjecting officers who have acted in good faith, placing reliance upon it. It is more important that the law on the subject be stable, fixed, and certain than that the statute receive an absolutely accurate construction after all these years.

Order affirmed.

## PETER STEINBACH v. JOHN BRANT.

May 8, 1900.

79	383
82	23

Nos. 11,975—(56).

**Assignment of Future Wages.**

An assignment of wages to become due, without limit as to amount or time, and without acceptance by the employer, and without notice to an attaching creditor, is void as to such creditor.

Action before a justice of the peace against John Brant, defendant, and Chicago, St. Paul, Minneapolis & Omaha Railway Company, garnishee. The garnishee disclosed that it was indebted to defendant in the sum of \$91.41, and the Sioux Trust Company intervened as claimant of the fund. From a judgment in favor of the claimant and against the garnishee for \$91.41 and against plaintiff for costs of the action, plaintiff appealed on questions of law alone to the district court for Watonwan county. In the district court the appeal was heard before Severance, J., who made an order reversing the judgment, and for judgment in favor of plaintiff and against the garnishee for \$91.41. From an order denying a motion for a new trial, the claimant appealed. Affirmed.

*F. B. Robinson* and *W. S. Hammond*, for appellant.

*Ashley Coffman*, for respondent.

LEWIS, J.

In proceedings in garnishment instituted by plaintiff in justice court, the garnishee was served with the summons on January 6, 1899, and appeared on the return day, January 14, 1899, and disclosed that it was indebted to defendant, Brant, in the sum of \$91.41, and stated that the Sioux Trust Company claimed the money under a written assignment, and demanded that the claimant be made a party. This was done, and claimant appeared, and answered that it was the owner of the money, under a written assignment. A hearing was had upon the pleadings, and judgment was rendered for the claimant for the sum of \$91.41 damages, and against the plaintiff for costs. Plaintiff appealed to the district court upon questions of law alone. In the district court the judg-

ment was reversed, and judgment was ordered for the plaintiff and against the garnishee for the sum of \$91.41. From an order denying its motion for a new trial, claimant appeals.

The return from the justice court shows that defendant, Brant, was in the employ of the garnishee from October 6, 1898, continuously up to the time of the service of the garnishee summons, January 6, 1899; that on the day of such service the garnishee was indebted to defendant in the sum of \$82.77, which he had earned as wages in December, 1898, and \$8.64 which he had earned in January, 1899. It also appeared that Brant had drawn his pay direct from the company every month from the date of the assignment. The return shows that claimant proved Brant's signature to the assignment, but no evidence was offered either as to the consideration of the assignment, or as to the nature of the contract of employment of defendant by the garnishee, or as to whether anything was actually due claimant at the time of the service of the garnishment. The claimant bases its claim to the money wholly upon the written assignment, which is as follows (Exhibit A):

"State of Iowa,        }  
Woodbury County.    } ss.

"For value received, I hereby sell, assign, and transfer to the Sioux Trust Company my claim against the C., St. P., M. & O. Railway Company for wages now earned and to be earned, due and to become due. And I do hereby represent, guaranty, and do solemnly swear that I am now employed by the said railroad company as conductor, and that there are no other assignments, liens, or garnishments against me or my wages, and that there is now due me from said railway company the sum of \$120.00; and I fully understand that I am making this affidavit for the purpose of effecting the above sale of my claim against said railway company.

"Residence, St. James, Minn.

J. W. Brant.

"Subscribed and sworn to before me this 6th day of October, 1898.

\_\_\_\_\_, Notary Public.

"Filed Feb. 23, '99.

W. E. Allen, Justice of the Peace."

This instrument contains the words "for value received," and those words import a consideration, and it was not necessary to prove it. Frank v. Irgens, 27 Minn. 43, 6 N. W. 380; Elmquist v.

Markoe, 39 Minn. 494, 40 N. W. 825. As to the amount of the claim then earned, this instrument operated as an assignment, and as to the wages "to be earned" and "to become due," conceding that it operated as an equitable assignment of the future earnings so far as the parties to the instrument were concerned, still, as to creditors of the assignor, there is some uncertainty, under the authorities. It is a general rule that, if the wages assigned are definitely defined and certain as to time, character, and amount, they may be assigned, when predicated upon a present contract for continuous employment. And, if the assignment is merely in the form of an order upon the employer, it must be accepted by the employer before it becomes binding upon either creditors or employers. It has also been held that, where the wages to be earned are definite and certain, they may be assigned, although not predicated upon a contract for continuous employment, but are wages earned in an existing employment, in its nature continuous. *Metcalf v. Kincaid*, 87 Iowa, 443, 54 N. W. 867; *Hartley v. Tapley*, 2 Gray, 565; *Emery v. Lawrence*, 8 Cush. 151. That phase of the question now under consideration has never been before this court. In *O'Connor v. Meehan*, 47 Minn. 247, 49 N. W. 982, the assignment was under seal, for value received, duly acknowledged by the assignor, and definitely referred to the wages to be earned for a certain month. In that case, however, the assignment was held to be invalid as to creditors, upon the ground of fraud.

Our attention has not been called to any case holding that, when the wages to be earned are uncertain, they may be assigned. But the case of *Boylan v. Leonard*, 2 Allen, 407, is similar to the one before us. In that case the assignment was absolute in form, for a consideration, and assigned all wages due and to become due from the employer. It was contended in that case that, the wages being indefinite and not limited as to time, the assignment was void for uncertainty as to creditors attaching wages earned nine months after the date of the assignment. The court held the assignment good, but based its decision upon the fact that not only was the employment continuous in its character, but it was based upon an original contract to labor for an indefinite period of time, and that

the employer had so understood the assignment and recognized it, by making various payments to the assignees before the service of the process.

In the record before us, we find no evidence of a contract for continuous employment. The wages to be earned are not stated or limited to any time, but are indefinite and uncertain, and there is no evidence that there was anything actually due the assignee at the time of service of the garnishment summons. On the contrary, the assignor had collected the wages every month himself. Such an assignment might pass to the assignee the contingent possible interest of the assignor in the future wages, and, if the labor was afterwards performed and the wages earned, the assignee could enforce his equitable interest against the assignor; but such a doctrine is too indefinite and uncertain in its application, and subject to too many possibilities, to apply to creditors and employers without notice. We hold, under the facts in this case, that the assignment was void as to the plaintiff.

Order affirmed.

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PATRICK TALTY v. C. J. TORLING.

May 8, 1900.

Nos. 11,997—(70).

**Counterclaim—Failure to Demur.**

*Held*, following *Walker v. Johnson*, 28 Minn. 147, and *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71, that objection to a counterclaim, as not proper subject of counterclaim, is waived by failure to demur.

**Estate of Decedent—Counterclaim against Estate.**

G. S. 1894, §§ 4519, 4520, provide that, if an administrator commence an action against any one to recover in the interest of the estate, the defendant may in that action set off any claim he has against the deceased, instead of presenting it to the probate court. This offset may be made, even if the estate has been distributed. It is immaterial that the time for filing claims has expired. *Gerdtzen v. Cockrell*, 52 Minn. 501, followed.

Action in the district court for Martin county by plaintiff, as ad-

ministrator of the estate of O. E. Wilber, deceased, to recover \$111 and interest on promissory notes executed to decedent. The answer set up a counterclaim, and demanded judgment for \$1,650. The case was tried before Quinn, J., and a jury, which rendered a verdict in favor of defendant for \$1,195. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*Voreis & Mathwig*, for appellant.

*Ward & Thompson* and *Gray & Thompson*, for respondent.

LEWIS, J.

Plaintiff, as administrator of the estate of O. E. Wilber, deceased, commenced this action against defendant for the purpose of recovering upon two promissory notes executed and delivered to Wilber in his lifetime, and found among the assets of the estate.

The answer admits the execution of the notes, but alleges payment by a settlement and accounting, and sets up a counterclaim that, in consideration of the settlement of the liabilities of Wilber to defendant, Wilber transferred to defendant certain personal property, a part of which was immediately delivered, and in consideration of the settlement Wilber agreed to assume and pay a certain mortgage upon defendant's property, and construct a house for defendant upon the lands covered by the mortgage; that Wilber died before completing the delivery of the property and the performance of the other agreements; that plaintiff, as administrator, with knowledge of other facts, appropriated the property which was to be conveyed, and has failed and refused to deliver the same to defendant, and has refused to complete the contract, to defendant's damage in the sum of \$1,650. For reply to this counterclaim, plaintiff alleged that the time for filing claims against the estate of Wilber had expired, and that defendant had not filed his claim, and that the matter pleaded as a counterclaim was not a proper subject of counterclaim. The cause came on for trial before the court and jury, and resulted in a verdict for the defendant for \$1,195. From an order denying his motion for a new trial, plaintiff appeals.

The cause was tried by respondent upon the theory that it was necessary to prove the original transaction out of which grew de-

fendant's claim for damages against Wilber, whereas the pleading is drawn upon the theory that the basis of defendant's action against Wilber was the contract by which the original claim was settled. Having alleged this contract of settlement, and a breach of it, as the basis of his action, it would have been error, against plaintiff's objection, to receive evidence of the original matters, had the plaintiff made and insisted upon the objections. But these errors were without prejudice, the same evidence having been received later without objection. Defendant also objected to the counterclaim, because it did not state facts sufficient to constitute a cause of action or counterclaim. Although the pleading is somewhat unsatisfactory, yet it substantially sets forth the agreement of settlement, the consideration, and a failure to complete it. It is equally well settled that the question of the proper subject of counterclaim must be raised by demurrer, or it will be deemed waived. *Walker v. Johnson*, 28 Minn. 147, 9 N. W. 632; *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71, 24 N. W. 344. The offset provided by G. S. 1894, §§ 4519, 4520, may be made after the time for filing claims against the estate has expired. *Gerdtsen v. Cockrell*, 52 Minn. 501, 55 N. W. 58.

Order affirmed.

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STATE v. NELS NELSON.

May 8, 1900.

Nos. 12,019—(12).

**Indictment Insufficient.**

An indictment which alleges that the defendant is accused of having committed an offense (stating it), but which does not directly charge that the defendant committed the offense, is insufficient, as against an objection that the indictment does not charge a crime, or state facts sufficient to constitute a public offense.

Nels Nelson was indicted for the offense described in the opinion in the district court for Freeborn county. The case was tried before Kingsley, J., and a jury, which rendered a verdict of guilty.

From an order denying a motion for a new trial, defendant appealed. Reversed.

*Henry A. Morgan*, for appellant.

*W. B. Douglas*, Attorney General, *C. W. Somerby*, Assistant Attorney General, and *R. S. Clements*, County Attorney, for the State.

LEWIS, J.

Appeal by defendant from an order denying defendant's motion for a new trial. The indictment reads as follows:

"Nels Nelson is accused by the grand jury of the county of Freeborn and state of Minnesota, by this indictment, of having on the 30th day of January, A. D. 1900, at the city of Albert Lea, in the county of Freeborn and state of Minnesota, committed the crime of wrongfully, unlawfully, and feloniously keeping and suffering to be kept, set up, and used for the purpose of gambling a gambling instrument and device, commonly called a 'nickel in the slot machine,'—the said nickel in the slot machine being then and there a mechanical contrivance of wheels, cogs, and levers, a more particular description of which is to the grand jury unknown, and adapted, devised, and designed to be used in gambling, in the first story of a two-story brick building on West Clark street, in said city of Albert Lea, county of Freeborn and state of Minnesota; the said first story of said building being then and there kept, used, and occupied by and under the control of said Nels Nelson."

The objection urged to this pleading is that the facts stated in it do not constitute a public offense, and that it charges no crime or public offense. G. S. 1894, § 7241, requires that an indictment shall be direct and certain, as it regards the party charged, the offense charged, and the particular circumstances of the offense charged, when necessary to constitute a complete offense. Section 7238 provides, second, that the indictment shall contain a statement of the acts constituting the offense, in ordinary and concise language. Section 7239 states that the indictment "may be substantially in the following form." Then follow forms of indictment applicable to different crimes, in all of which is present the description of the offense charged, and a specific charge that the accused committed that offense, viz.:

"A. B. is accused by the grand jury of the county of ——— by this indictment of the crime of ———, (here insert the name of the offense, \* \* \* or if \* \* \* having no general name \* \* \*



insert a brief description of it \* \* \*), committed as follows: The said A. B. on the ——— day of ——— A. D. 18—, at the, etc. \* \* \* (Here set forth the act charged as an offense \* \* \*.)”

Section 7240 provides that the manner of stating the act constituting the offense as set forth in the preceding forms is sufficient in all cases where the forms there given are applicable. In all other cases forms may be used as nearly similar as the nature of the case permits. These sections and forms must be taken into account when testing the validity of an indictment. The specific matters stated as necessary in section 7241 are recognized and applied in the various forms. There must be a direct charge against the accused that he committed the offense. A recital that he is accused of having committed it is not a charge that he has committed it.

The indictment under consideration states that defendant is accused of having committed an offense, and the offense is described; but the pleading does not charge directly that defendant committed the offense, and for this reason the order of the trial court must be reversed, and the cause remanded, with directions to the district court to discharge the defendant, or resubmit the matter to another grand jury, as it may be advised. So ordered.

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FLORA E. MORTON v. WILLIAM URQUHART.

May 8, 1900.

Nos. 12,099—(126).

#### **Set-Off of Judgment—Attorney's Lien.**

In an action brought by a judgment debtor against his judgment creditor to offset mutual judgments, *held*, that the judgment debtor may, without prejudice as to an attorney's lien upon the other judgment, offset the mutual judgments, provided the action for that purpose be commenced without notice of the attorney's lien.

Action in the district court for Hennepin county praying that a certain judgment in favor of defendant and against plaintiff be offset against a judgment against defendant held by plaintiff, that

plaintiff's judgment be satisfied pro tanto, and that defendant be restrained from enforcing his judgment. James D. Shearer, who claimed under an assignment from defendant of his judgment, was made a party defendant. The case was tried before McGee, J., who found in favor of defendant Shearer. From an order denying a motion for a new trial, plaintiff appealed. Reversed

*George E. Young and Robert Christensen*, for appellan.

The court had power to offset the judgments against each other. *Temple v. Scott*, 3 Minn. 306 (419); 22 Am. & Eng. Enc. 446; *Hovey v. Morrill*, 61 N. H. 9; *Alexander v. Durkee*, 112 N. Y. 655; *Simson v. Hart*, 14 Johns. 63; *Herman v. Miller*, 17 Kan. 328; *Scott v. Rivers*, 1 Stew. & P. 24. Shearer, as assignee, stands in the shoes of Urquhart, and the court should have offset the judgments. *People v. New York*, 13 Wend. 650; *Wright v. Cobleigh*, 23 N. H. 32; *Jones v. Chalfant*, 55 Cal. 505; *Haskins v. Jordan*, 123 Cal. 157; *Brisbin v. Newhall*, 5 Minn. 217 (273); 2 Black., Judgm. § 953; 22 Am. & Eng. Enc. 457; *Hobbs v. Duff*, 23 Cal. 596. If the right of set-off existed at the time of the assignment to Shearer, and he took for value and without knowledge of plaintiff's judgment, or of the right of set-off, then these judgments should be set off against each other. *Haskins v. Jordan*, supra; *Bank v. Gadsden*, 56 So. C. 313; *Bien v. Freund*, 26 App. Div. (N. Y.) 202; *Pabst v. Leuders*, 107 Mich. 41; *McBride v. Fallon*, 65 Cal. 301; *Hovey v. Morrill*, supra; *Hobbs v. Duff*, supra; *Yorton v. Milwaukee*, 62 Wis. 367; *Bosworth v. Tallman*, 66 Wis. 533; *Robeson v. Roberts*, 20 Ind. 155; *Wells v. Clarkson*, 5 Mont. 336; *Peirce v. Bent*, 69 Me. 381; *Bush v. Monroe*, 20 Ky. L. 547. Mutual judgments will be set off against each other, even though one of them may have been assigned for the purpose of preventing such set-off. *Duncan v. Bloomstock*, 2 McCord, 318; *Russell v. Conway*, 11 Cal. 93; *Hovey v. Morrill*, supra; *Hurst v. Sheets*, 14 Iowa, 322; *Martin v. Pillsbury*, 23 Minn. 175; *Way v. Colyer*, 54 Minn. 14. See *Crocker v. Claughly*, 2 Duer, 684.

An attorney who obtains judgment, and afterwards becomes owner of it, cannot interpose his lien for costs and disbursements as an objection to the set-off of another judgment against it. It

cannot be held that a party has a lien upon what is his own. *Perry v. Chester*, 4 Jones & Sp. 228. An attorney who has not given notice of his lien for costs cannot object that an assignment of a judgment against his client, taken for the purpose of making a set-off, is in fraud of his lien. *People v. New York*, supra. On a bill in equity, the attorney's lien cannot be regarded, but on motion it may. *Purchase v. Bellows*, 16 Abb. Pr. 105; *Nicoll v. Nicoll*, 16 Wend. 446; *Martin v. Kanouse*, 17 How. Pr. 146; *Ainslie v. Boynton*, 2 Barb. 258; *Perry v. Chester*, supra. Plaintiff, not having slept on her rights and asking only equity, is entitled to equitable relief. The proceeding not being equitable, it is not addressed to the discretion of the court; and, under the facts, she has a right to demand the set-off. *Simson v. Hart*, supra.

*James D. Shearer*, for respondent.

The intervenor obtained a lien. G. S. 1894, § 6194. Notice is not necessary. Except in the one contingency, to prevent the adverse party from paying the debt in ignorance of the attorney's right, a lien exists as fully without as with notice. This is so as against the adverse party, as well as against the attorney's client. *Perry v. Chester*, 53 N. Y. 240, 244; *People v. New York*, 13 Wend. 650; *Young v. Dearborn*, 27 N. H. 324, 328; *Stratton v. Hussey*, 62 Me. 286, 288. If the contract for a lien was informal, yet it was sufficient if the work was done in reliance on the lien. In any event Urquhart only could take advantage of the informality of the agreement. The lien did not merge in the assignment; but if it did, this is immaterial. *Kinney v. Tabor*, 62 Mich. 517. The intervenor's rights under his lien and subsequent assignment were not subject to be defeated by plaintiff's right of set-off. *Lindholm v. Itasca L. Co.*, 64 Minn. 46, 48; *Lundberg v. Davidson*, 68 Minn. 328, 332. The agreement between Urquhart and intervenor for a lien operated as an equitable assignment. In executing the assignment to his attorney, Urquhart did but what in equity he would have been compelled to do. *Ely v. Cooke*, 28 N. Y. 365, 374. So that, long before plaintiff obtained the Grimes judgment, the recovery in the preceding action had been bargained away by Urquhart to his attorney. *Ely v. Cooke*, supra; *Rooney v. Second Ave.*,

18 N. Y. 368; *Zogbaum v. Parker*, 55 N. Y. 120. An agreement between debtor and creditor that the latter shall have a claim on a specific fund for payment of his debt operates as an appropriation of the fund pro tanto to the payment, and as an equitable assignment of the fund to that extent; and the assignment of a chose in action may be by parol. *Board v. President*, 38 N. J. Eq. 36, 39. In the King's Bench in England the rule is that judgments between the parties cannot be set off so as to deprive the attorney of his lien for costs. *Mitchell v. Oldfield*, 4 Term R. 123, and cases cited in note 38 N. J. Eq. 37. The rule is otherwise in the Common Pleas. *Id.* See *Collett v. Preston*, 15 Beav. 458. The lien of the attorney, however, in an assigned judgment is now generally recognized as superior to any right of set-off as to judgments between the parties. *Zogbaum v. Parker*, *supra*; *Davidson v. Alfaro*, 16 Hun, 353, 80 N. Y. 660; *Currier v. Boston*, 37 N. H. 223; *Boyer v. Clark*, 3 Neb. 161; *Rice v. Garnhart*, 35 Wis. 282; *Diehl v. Friester*, 37 Oh. St. 473; *Wells v. Elsam*, 40 Mich. 218; *Ripley v. Bull*, 19 Conn. 53; *Stratton v. Hussey*, *supra*; *Shapley v. Bellows*, 4 N. H. 347. Even where the judgment sought to be set off was recovered before the other judgment. *Ely v. Cooke*, *supra*; *Perry v. Chester*, *supra*; *Prince v. Fuller*, 34 Me. 122; *Stillman v. Stillman*, 4 Lea, 271. A defendant against whom a judgment has been recovered cannot, by purchasing a judgment against the plaintiff, offset it so as to defeat the attorney's lien. *Bradt v. Koon*, 4 Cow. 416. A motion that one judgment be set off against another is an appeal to the equitable power of the court to be granted or refused on consideration of all the facts; and in granting such motion the claim of the attorneys for fees will be respected whenever it appears to be right in view of the facts. *Diehl v. Friester*, 37 Oh. St. 473. See *Boyer v. Clark*, *supra*; *Currier v. Boston*, *supra*; *Duncan v. Lyon*, 3 Johns. Ch. 351, 358; *Simmons v. Reid*, 31 So. C. 389, 392; *Puett v. Beard*, 86 Ind. 172; *Makepeace v. Coates*, 8 Mass. 451; *Roberts v. Mitchell*, 94 Tenn. 277.

LEWIS, J.

1. The plaintiff brought this action against the defendant Urquhart for the purpose of procuring an offset of mutual judgments.

Defendant's attorney, Shearer, was made a party defendant on the trial, claiming to have taken an assignment from defendant of his judgment against plaintiff prior to the commencement of this action. The trial below resulted in an order for judgment for Shearer. Plaintiff appeals from an order denying a new trial.

The here conceded facts are as follows: In May, 1899, defendant began an action against plaintiff in the municipal court of Minneapolis, which finally terminated in an order for judgment of date June 23, 1899, and in a judgment in favor of defendant and against plaintiff in the sum of \$117.23, which judgment was entered in said court on September 5, 1899; that the attorney for defendant in that action was James D. Shearer, the intervenor in the case before us; that at the time Shearer was employed in the action it was agreed between him and the defendant that the attorney should have a lien upon any judgment that might be obtained for his reasonable attorney's fees in that action, and for any disbursements which he should make therein; that on August 30, 1899, defendant made an oral assignment of his recovery in the action, and of the judgment to be entered therein, to the attorney, Shearer; that on September 4, 1899, defendant and Shearer agreed that the attorney's fees in that action should be \$101, and that his disbursements should be allowed at \$4.46, and that those amounts were just and reasonable, and that no part thereof has been paid; that on September 5, 1899, an assignment in writing was made by defendant to Shearer of all defendant's interests in the judgment that day rendered in that action, which assignment was filed in the office of the clerk of the municipal court on September 18, 1899. It is further conceded that on July 1, 1899, the plaintiff purchased a certain judgment, rendered in a justice court in Minneapolis, for the sum of \$86.40, in favor of one Grimes and against defendant, on October 24, 1889, which judgment was assigned by Grimes to plaintiff of date July 1, 1899, and the assignment filed in the justice court on July 3, 1899.

The summons in the present action was served upon defendant Urquhart on August 30, 1899, and at that time he was insolvent. In the original complaint the judgment against plaintiff was alleged to have been rendered on August 29, 1899. In the amended

complaint, which was served on September 15, 1899, this date is alleged to be September 5. It is conceded that plaintiff had no notice of defendant Shearer's claim of lien for attorney's fees, and no notice of any of the agreements as to fees between defendant and his attorney, and of the assignments of the judgments by defendant to Shearer, except the constructive notice of the assignment filed September 18, 1899. It is not necessary to consider whether the attorney's lien was merged in the assignment. We assume, under the findings, that there was an agreement for compensation, and that the lien became vested September 5, 1899, when the judgment was entered against plaintiff, and it is immaterial whether this lien was merged in the assignment.

Assuming that the lien still survived after the assignment, yet plaintiff had no notice of any claim of the attorney until the assignment was filed, September 18, 1899. G. S. 1894, § 6194, provides that the attorney shall have a lien for his compensation upon a judgment from the time of giving notice to the party against whom the judgment is obtained. Defendant insists that this statute was enacted purely for the benefit of the attorney, and to prevent the judgment debtor from paying the judgment creditor and leaving the attorney out; that the lien, by force of the statute confirming it, is absolute; and, in the absence of the section referred to requiring notice, the judgment debtor would stand in the same position as creditors of the judgment creditor. We are not called upon to decide what would be the respective rights of the judgment debtor and the holder of an attorney's lien against the judgment, if the statute were not in force. But it is in force, and it provides that, so far as the judgment debtor is concerned, the attorney must act. He must give notice of his rights. Granted that the object of the statute is to protect the attorney, yet that protection does not operate of itself. And if it is to prevent the judgment debtor from paying the judgment creditor, leaving the attorney out, this implies that, without notice of the lien, he may pay the judgment creditor; and, if he may pay him in money or goods, he may settle with him in any other manner; and so it follows, upon principle, that he may enforce a settlement by offsetting one judgment against the other. Again, it has been held that the equitable

right of set-off between parties to the action is superior to the claims of attorneys, without regard to the statute. An attorney can have no greater right against the judgment debtor than his client. *People v. New York*, 13 Wend. 650; *Crocker v. Claughly*, 2 Duer, 684.

Order reversed.

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DAVID E. JONES v. ISAIAH H. BRADFORD.

May 8, 1900.

Nos. 12,108—(85).

**Verdict Sustained by Evidence.**

Evidence examined, and *held* to support the verdict.

**Examination of Adverse Party under G. S. 1894, § 5659.**

When a party to an action is called by the adverse party for cross-examination, under G. S. 1894, § 5659, the time of the examination of the witness by the attorney of such party rests in the sound discretion of the trial court.

Action in the district court for Hubbard county to recover a balance of \$233.10 and interest for goods sold and delivered and money advanced. The case was tried before Holland, J., and a jury, which rendered a verdict in favor of plaintiff for \$318.38. From a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

*Coppernoll & Willson*, for appellant.

*A. G. Broker*, for respondent.

LEWIS, J.

Action to recover for money advanced and for goods sold and delivered to defendant by plaintiff's assignor. Defense, that the goods were purchased by defendant as the agent for and on account of one James Billings, and that the same had been paid. Verdict for plaintiff. Defendant appeals from an order denying a new trial. There are two assignments of error.

1. Plaintiff called the defendant for cross-examination, under the statute (G. S. 1894, § 5659), and by him identified an instrument,

Exhibit A, proved the signature, and then asked this question: "In fulfilment of that, plaintiff's Exhibit A, you went on, and cut this timber, didn't you?" to which witness answered, "Yes, sir." Then defendant's counsel proceeded to cross-examine and ask the witness as follows: "Now, Mr. Bradford, \* \* \* there were different arrangements made, were there not?" to which plaintiff objected, as not being proper cross-examination at that time. The objection was sustained, and defendant assigns as error this ruling.

The statute in question states that a party to the action may be examined as if under cross-examination by the adverse party, and may be compelled to testify in the same manner, and subject to the same rules for examination, as any other witness. The method to be pursued under this statute rests in the reasonable discretion of the court. The most natural and logical way would be to reserve the examination of the witness by the opposite party until his case proper is reached. In the case before us defendant alleged that defendant was acting as agent, only, of Billings, and it would be the most natural order to introduce the evidence tending to show agency, and changes in the agreement, when the defense in chief was reached. But there can be no hard and fast rules laid down in this respect. The defense could not be deprived of an opportunity to examine the witness, and it appears that he was called and examined by defendant. The defendant was not prejudiced, and there was no error in the ruling.

2. The other assignment presents the claim that the evidence does not justify the verdict. We have read the original contract executed by defendant and Billings, and the testimony of the several witnesses in reference to the operations of defendant under it, and the possible changes made in its terms. It will add nothing to review this record. We are satisfied that the evidence is ample, and sufficient to support the verdict.

Judgment affirmed.



**D. O. SWANSON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.**

May 9, 1900.

Nos. 11,900—(8).

**Railway—Duty of Closing Farm Gates.**

It is the duty of the landowner for whose benefit and convenience gates are constructed and placed in a railroad right-of-way fence at a private farm crossing upon the land of such owner to keep such gates closed.

**Same—Duty of Railway Company.**

The railway company owes no duty to the landowner at whose instance and for whose convenience and upon whose land such gates are put into the railroad fence, or to those in privity with him, to keep such gates closed. Its full duty is performed if the gates are kept in reasonably good repair.

Action in the district court for Goodhue county to recover \$300 damages for the killing of plaintiff's horses, by reason of defendant's negligence in failing to build, maintain, repair, and keep closed a fence. The case was tried before Williston, J., who, at the close of plaintiff's testimony, granted defendant's motion to dismiss the action. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*Albert Johnson*, for appellant.

It was the duty of the company to shut the gate and repair the fence. The case should have been submitted to the jury. G. S. 1894, §§ 2693, 2695; *Green v. St. Paul, M. & M. Ry. Co.*, 60 Minn. 134; *Chisholm v. Northern Pac. R. Co.*, 53 Minn. 122; *Savage v. Chicago, M. & St. P. Ry. Co.*, 31 Minn. 419; *Watier v. Chicago, St. P., M. & O. Ry. Co.*, 31 Minn. 91; *Evans v. St. Paul & S. C. R. Co.*, 30 Minn. 489; 3 Elliott, Railr. § 1200; 1 Rorer, Railr. 495, 496. There is no evidence that the gate was constructed for benefit of the landowner, and the court had no right to assume that fact. If the road was constructed since 1887, the gate would be an important item, and the privilege to put it in was a benefit to the

company. G. S. 1894, §§ 2696, 2697; *Schmidt v. Minneapolis, L. & M. Ry. Co.*, 38 Minn. 491. The company was bound to keep the gate closed, or to use reasonable care. *Greeley v. St. Paul, M. & M. Ry. Co.*, 33 Minn. 136. It made no difference whether the horses passed out in that part covered by the gate or in that part covered by the posts and wire. Both were open, and the company was obliged to use reasonable care to know the condition of each. None of the cases go to the extent of holding that plaintiff would be required to show the place of entry with any greater certainty.

The statute creates the liability, and contributory negligence is no defense. *Shepard v. Buffalo*, 35 N. Y. 641; *Corwin v. New York*, 13 N. Y. 42; *Jeffersonville v. Ross*, 37 Ind. 545; *Louisville v. Whitesell*, 68 Ind. 297; *Lloyd v. St. Louis*, 128 Mo. 595; *Flint v. Lull*, 28 Mich. 510; *Nashville v. Nowlin*, 1 Lea, 523; *Railroad v. Walker*, 11 Heisk. 383; *Nashville v. Carroll*, 6 Heisk. 347; *Railway v. Foster*, 88 Tenn. 671; *Macon v. Davis*, 27 Ga. 113; *Macon v. Winn*, 26 Ga. 250; *Atlanta v. Ayers*, 53 Ga. 12; *Kain v. Larkin*, 56 Hun, 79; *Jones v. Louisville*, 82 Ky. 610; *Illinois v. Dick*, 91 Ky. 434; *Louisville v. Coniff (Ky.)* 27 S. W. 865; *Chesapeake v. Yost (Ky.)* 29 S. W. 326; *Catlett v. Young*, 143 Ill. 74; *Quackenbush v. Wisconsin*, 71 Wis. 472; *Queen v. Dayton*, 95 Tenn. 458; *Rowell v. Railroad*, 57 N. H. 132; *Mathews v. St. Louis*, 121 Mo. 298. Turning out cattle with knowledge of defects in the fence is not as matter of law contributory negligence. *Schubert v. Minneapolis & St. L. Ry. Co.*, 27 Minn. 360; *Johnson v. Chicago, M. & St. P. Ry. Co.*, 29 Minn. 425; *Watier v. Chicago, St. P., M. & O. Ry. Co.*, *supra*; *Green v. St. Paul, M. & M. Ry. Co.*, 55 Minn. 192; *Ericson v. Duluth & I. R. R. Co.*, 57 Minn. 26; *Evans v. St. Paul & S. C. R. Co.*, *supra*. Contributory negligence is an affirmative defense, and must be proved by the party relying on it. *Hocum v. Weitherick*, 22 Minn. 152.

*F. W. Root*, for respondent.

Defendant was not shown to have been negligent. Where a railroad constructs gates in its right-of-way fence solely for convenience and benefit of an adjoining landowner, the duty to keep the gates closed rests on him and not on the company; and this is especially true where the landowner owns and controls the land on

both sides of the track. *Adams v. Atchison*, 46 Kan. 161; *Texas v. Glenn*, 8 Tex. Civ. App. 301; *Bond v. Evansville*, 100 Ind. 301; *Hook v. Worcester*, 58 N. H. 251; *Eames v. Boston*, 96 Mass. 151; *Waldron v. Portland*, 35 Me. 422; *Megrue v. Lennox*, 59 Oh. St. 479; *Diamond v. New York*, 58 Hun, 396. These gates having been constructed solely for benefit of plaintiff or his landlord, he owning and occupying the land upon both sides of the track and thereby controlling both gates, if the gates are found open the presumption is that either he, or some one representing him, left them open. *Harding v. Chicago*, 100 Iowa, 677. Plaintiff's negligence was conclusively shown. *Ericson v. Duluth & I. R. R. Co.*, 57 Minn. 26, 28; *Peterson v. Northern Pacific*, 86 Wis. 206; *Carey v. Chicago*, 61 Wis. 71.

BROWN, J.

This is an appeal from an order of the district court of Goodhue county denying plaintiff's motion for a new trial after verdict for defendant. The action is to recover the value of certain horses heretofore owned by plaintiff, alleged to have strayed upon defendant's railroad track through a defective fence along defendant's right of way, and killed by one of its locomotives.

At the time the horses were killed, plaintiff was in possession of the land described in the complaint, and had been in the possession thereof, as tenant of the owner, for fifteen years prior thereto. During the year 1897 he used said land as a pasture for his horses and cattle. The railroad track of defendant extends across the southeast corner of this pasture, running in a northeasterly direction, leaving a very small portion of land in the southeast corner of the tract. In compliance with the statutes of the state, defendant constructed a fence on each side of its right of way as it extends across said land, and at the instance and for the convenience of the owner of the land put into such fence gates on each side of the track at a private wood road leading from plaintiff's land "onto the lowlands south of the track." These gates were in the fence during all the time of plaintiff's occupancy of the land. Soon after the horses were killed, plaintiff examined the railroad fence, and discovered that the gate leading from the pasture into the right of way was open, and also that at a short distance from such gate

the fence was partly down, and considerably out of repair. Plaintiff turned his horses into the pasture the day of the accident. They made their way into the right of way, either through the open gate or at the point where the fence was out of repair, and were killed. There is no evidence showing at which point they passed through the fence.

Plaintiff's counsel contends that it is immaterial whether they passed through the gate or at the point where the fence was out of repair. His contention in this respect is correct if it be held that the railroad company was in duty bound to keep the gate closed. There is no evidence showing by whom the gate was left open. Whether by plaintiff's servants or by some third person does not appear. The gate was not used by defendant, and the evidence furnishes no suggestion that its servants had left it open. If it be held that the defendant was under no duty or obligation to keep the gate closed, the order appealed from must be sustained, because there is no evidence to justify a finding that the horses entered the right of way at the point where the fence was out of repair. If such is the law, it was incumbent on plaintiff to show a failure of duty on the part of defendant with respect to keeping its fence in good repair, and that such failure of duty was the direct and proximate cause of the injury sustained; in other words, that the horses entered upon the right of way at the point where the fence was defective, and not at the gate. It is not claimed that the gate was not in reasonably good repair. So we are confronted with the question whether it was the duty of the defendant to keep the gate closed. The question is of more than passing importance, and we have given it a thorough and careful consideration.

Our statutes provide that all railroad companies in this state shall build or cause to be built good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of such road, and maintain the same. G. S. 1894, § 2696, provides:

"That whenever a railroad shall hereafter be laid out, opened, and fenced through the farm lands of any owner of such lands in this state, leaving parts of such lands on both sides of such railroad,

the said railroad \* \* \* shall construct a necessary crossing or crossings, under, over or across such railroad, for the passage of stock to and from such parts of such land."

We deem the evidence sufficient to justify the conclusion reached by the trial court that the gates were placed in the fence by the railroad company at the instance and for the convenience of the owner of the land. The evidence furnishes no intimation that they were for the use of the railroad company. They were evidently not constructed or intended as a compliance with section 2696, above quoted; at least there is no evidence that the very small tract of land south of the railroad track was used in connection with that portion north of the track, or used at all. The gates were constructed at the wood road leading from plaintiff's land north of the track to the lowlands on the south, which road was used by the plaintiff and others in the neighborhood, with his apparent permission, principally in the winter season. Plaintiff and his neighbors were the only persons using such road, and the only persons passing through the gates. It cannot be presumed that the defendant's employees left the gates open. Indeed, inasmuch as the gates were upon the premises of plaintiff, and under his control, the natural presumption would be that he, or those representing him, left them open. But this is not important. The plaintiff rests his case upon the square proposition that it was the duty of defendant to keep the gates closed as a part of its duty to "maintain" the fence. In this we cannot concur.

No case involving the precise point has ever been before this court, and we are confronted with the question for the first time. It has been before the court of last resort in other states, and the trend of the later decisions relieves the company of the responsibility as to the landowner for whose benefit the gates are placed in the fence, and casts the duty of keeping the gates shut upon the latter. The company's duty is fully performed if it constructs a suitable gate, and keeps and maintains it in reasonably good repair. *Adams v. Atchison*, 46 Kan. 161, 26 Pac. 439; *Texas v. Glenn*, 8 Tex. Civ. App. 301, 30 S. W. 845; *Bond v. Evansville*, 100 Ind. 301; *Eames v. Boston*, 96 Mass. 151; *Diamond v. New York*, 58 Hun, 396, 12 N. Y. Supp. 22; *Megrue v. Lennox*, 59 Oh. St. 479, 52 N. E. 1022;

*San Antonio v. Robinson*, 17 Tex. Civ. App. 400, 43 S. W. 76; *Box v. Atchison*, 58 Mo. App. 359.

We believe this rule to be consistent, and in accord with the plainest principles of equity and justice, and we adopt it as the law of this state. It can work no hardship to the landowner. He and his servants can, without the least inconvenience, keep the gates closed, and the railroad company should not be burdened with responsibility for their neglect to do so. To impose the duty upon the company, at least as respects the landowner, for whose benefit the gates are erected, and those in privity with him, would be, it seems to us, extremely unreasonable and unjust. It would be impracticable for the company to perform the duty, if imposed upon it, without keeping an employee constantly on the watch to guard and protect the landowner from his own neglect. And a construction of the law in harmony with appellant's contention would result in relieving the landowner of all responsibility with respect to keeping the gates closed, and cast the entire burden on the company. We cannot concur in this view of the law, or adopt the theory of appellant's counsel. Our statutes not only require the railroad company to construct a fence, but to maintain the same after it has been constructed; and counsel insists that a failure to keep such gates closed is a failure to maintain the fence. The contention is untenable. If the gates are kept in a reasonably good condition of repair, they are sufficiently "maintained." within the meaning of the statutes.

We do not wish to be understood as holding that this rule is applicable to any person or persons other than the landowner for whose convenience and benefit the gates are placed in the fence, and those in privity with him. The question of liability of the company as to third persons who suffer damage by reason of such gates being left open is not decided. Perhaps, if the company furnished the landowner a lock and key for such gates, it would be relieved from liability even as to such third persons, within the meaning of G. S. 1894, § 6889. But this statute cannot be construed as casting the burden of keeping the gates closed upon the company, at least not as to the landowner.

Our conclusion is that the learned trial judge properly dismissed the action, and the order appealed from is affirmed.

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JOHN BRAUN v. NORTHERN PACIFIC RAILWAY COMPANY.

May 9, 1900.

Nos. 12,027—(61).

**(Passengers on Railway—Parent and Child—Payment.**

The law implies a contract on the part of a parent who enters a railroad train with a child non sui juris, and subject to payment of fare, to pay the fare of such child.

**Same—Removal for Nonpayment.**

If he refuse to pay such fare, both may be expelled and removed from the train, even though the parent tenders payment of his own fare. }

**Removal of Child—Removal of Parent.**

The forcible ejection and removal of a child of tender years from a railroad train on which it has taken passage with its parent, for the failure of the parent to pay the child's fare, is, whether rightful or wrongful, in effect the ejection and removal of the parent. If, in such case, the parent has paid his own fare before the removal of the child, such fare, or the unearned value thereof, must be returned, or offered to be returned, as a condition precedent to the right of removal.

Action in the district court for Ramsey county to recover \$2,000 damages for the ejection of plaintiff and his infant son from defendant's train. The case was tried before Kelly, J., and a jury, which rendered a verdict in favor of plaintiff for \$200. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*C. W. Bunn and L. T. Chamberlain, for appellant.*

If defendant contracted to carry plaintiff's son, the expulsion of the boy was wrongful. If no contract was made, inasmuch as fare was neither paid, tendered, nor intended to be paid, defendant had a right to eject the boy, as it did, without physical injury either at a station or elsewhere. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210.

The ticket seller at Cleveland did not have authority, either express or implied, to contract for carriage of plaintiff's son free of charge over defendant's road. A principal is only bound by acts of a special agent strictly within his authority, and a third party is bound at his peril to ascertain the limit of that authority. 1 Am. & Eng. Enc. 351. There was no general agency. If the preceding conductors, knowing the boy's age, carried him free, it is immaterial. Defendant is not bound thereby, nor even if preceding conductors on defendant's own road had done so. *Cox v. Los Angeles*, 109 Cal. 100; *Poulin v. Canadian Pac. Ry. Co.*, 6 U. S. App. 298; *Dietrich v. Pennsylvania*, 71 Pa. St. 432. See *Weikle v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 64 Minn. 296; *Nat. Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224; 24 St. (U. S.) 379 (c. 104) § 2; 25 Id. 855 (c. 382).

The alleged contract is either without consideration or invalid as an attempted variation by parol of a contemporaneous written contract. The tickets were contracts for the carriage of one person each. *Dunlap v. Northern Pac. R. Co.*, 35 Minn. 203; *Poulin v. Canadian Pac. Ry. Co.*, *supra*; *Hill v. Syracuse*, 63 N. Y. 101, 103; 1 Fetter, Car. § 276. The only damages, even if authority on part of the ticket seller to contract to carry the child existed, would be the value of the fare and the reasonable value of time lost. See *Poulin v. Canadian Pac. Ry. Co.*, *supra*; *Bradshaw v. South Boston*, 135 Mass. 407; *McKay v. Ohio*, 34 W. Va. 65; *Frederick v. Marquette*, 37 Mich. 342; *Yorton v. Milwaukee*, 54 Wis. 234; *Townsend v. New York*, 56 N. Y. 295; *Peabody v. Oregon*, 21 Ore. 121. The damages were excessive. *Kleven v. Great Northern Ry. Co.*, 70 Minn. 79, 82.

*Moritz Heim and Stevens, O'Brien, Cole & Albrecht*, for respondent.

There was in effect an expulsion of plaintiff, and, conceding for the sake of argument that defendant had the right to expel him, it only had the right to do so by restoring his ticket or its unearned value. *Wardwell v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 514; *Lake Shore v. Orndorff*, 55 Oh. St. 589, 38 L. R. A. 140, note. It would be unreasonable to say that under such circumstances the parent left the car voluntarily. *Gibson v. East Tenn., V. & G. R.*



Co., 30 Fed. 904. Defendant would clearly not be justified in taking a child eight years old from its parents and throwing him off at a side track, whether he had paid fare or not. *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62; *Louisville v. Sullivan*, 81 Ky. 624; *Johnson v. Chicago*, 58 Iowa, 348. Plaintiff's duty was to protect his child under the circumstances, and he had the right to treat its ejection as his ejection, without any formal order from defendant as to himself.

The authority to make contracts for carriage of passengers involves power to make all ordinary collateral arrangements connected with such contracts, and prima facie the principal is bound by these arrangements. *Watts v. Howard*, 70 Minn. 122; *Young v. Pennsylvania*, 115 Pa. St. 112; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Burnham v. Grand Trunk*, 63 Me. 298; *Hutchinson, Car.* §§ 262, 580 l. The contract was entire to carry the grown persons and the child for a gross sum. It makes no difference whether that gross sum was arrived at by computing a certain fare for grown persons or not; the consideration for the contract was the money paid by plaintiff on the representation of the company that the party might be transported for that price. A railroad ticket is ordinarily not regarded as a complete contract, but is rather in the nature of a receipt or token, and in any case is only binding as a contract so far as the terms are clearly expressed thereby; and the oral evidence as to the real terms of the entire contract may be received in so far as it does not contradict clearly expressed conditions of the ticket itself. *Hutchinson, Car.* § 580; *Peterson v. Chicago*, 80 Iowa, 92. A contract of transportation entirely independent of the ticket may be shown. *Van Buskirk v. Roberts*, supra; *Grimes v. Minneapolis, L. & M. Ry. Co.*, 37 Minn. 66. Compensatory damages include the elements of mental suffering, humiliation, and degradation, as well as the amount of fare and loss of time and inconvenience. 2 *Fetter, Car.* § 538. The damages were not excessive. *Finch v. Northern Pac. R. Co.*, 47 Minn. 36.

**BROWN, J.**

This action is one to recover damages for the alleged wrongful expulsion of plaintiff and his infant son from one of defendant's

passenger trains on August 7, 1898. The facts are as follows: On August 5, 1898, plaintiff applied to a railroad ticket agent at Cleveland, Ohio, for through railroad tickets from that city to Hebron, in the state of North Dakota, for himself, wife, four children, and two adult persons, not members of his family. What occurred between him and the ticket agent is best disclosed by the evidence, as follows:

"Q. Well, did you have any talk with this man before you bought the tickets? A. Yes. Q. Now tell us, slowly, what that talk was, so all these gentlemen will understand you. A. I come to the office, and ask what it cost,—a ticket to North Dakota, Hebron; one ticket. He tell me it cost \$29,—one ticket. Q. He told you \$29, the price of the ticket? A. Yes; one ticket. And he says when I buy more tickets I get cheaper. And I tell him I got four small children, and I and my wife and two girls, and he says— Q. He says what? A. He says, 'I give you four tickets for the whole family, for the whole eight persons, and you pay me for every ticket \$27.25.' And I say, 'All right,' and I give him \$109, and put my name, and he gave me four tickets. Q. Was anything said between you about the ages of the children? A. No, nothing. I ask him before I buy the tickets, 'I got four small children.' He ask me how old the oldest one. I told him eight years. He says: 'All right. He pay nothing.'"

The tickets were delivered to plaintiff, and he at once started on his journey with the members of his party, reaching St. Paul on the morning of August 7. The agent of whom such tickets were so purchased was an agent of the Nickel Plate railroad, but was authorized to sell through tickets over connecting lines between Cleveland, by way of and over defendant's line, to said Hebron. As stated, plaintiff's party consisted of four adult persons and four children. Among the children was a boy of the age of eight years. Plaintiff obtained no separate ticket for the boy, and had no written evidence that he was entitled to passage with the other members of the party, but plaintiff claims that his right of passage was covered and secured by the contract with the Cleveland agent under which the tickets were purchased. Counsel for defendant do not question the authority of this agent to sell the tickets to plaintiff, nor the validity of the tickets. But they do question and contest the validity of the alleged contract for the passage of the

boy without payment of fare. They insist that the authority of the Cleveland agent was limited to selling tickets, and that he had no authority or power to contract for the transportation of children without tickets, nor to agree for the defendant company that children over five years of age should be carried free. Defendant's passenger rates and instructions to agents were offered and received in evidence, from which it appears, among other things, that children under twelve and over five years are required to pay half-fare rates for tickets or transportation.

Whether the Cleveland agent had authority to make a contract, binding on defendant, for the transportation of plaintiff's boy free,—for such is the result of the transaction shown by plaintiff's testimony,—is a question clothed in much doubt, and is difficult of solution. We are not agreed on the subject. And as another feature of the case, presented by the pleadings and evidence, renders a decision of the question unnecessary, we pass it without discussion. The evidence tending to prove such contract may be referred to upon the question whether plaintiff entered defendant's train with his boy, and insisted upon his passage without a ticket other than the one he himself possessed, in good faith, and without wrongful intent to defraud the company; and it was proper for the consideration of the jury on the question of damages. While we differ on the question of the authority of the Cleveland agent to enter into the alleged contract for the free transportation of the boy, we are agreed that plaintiff's recovery should be sustained on the rule laid down in the case of *Wardwell v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 514, 49 N. W. 206.

Plaintiff and his party entered one of defendant's trains on the morning of August 7, 1898, at St. Paul, to continue their journey to Hebron. Before arriving at Minneapolis, the conductor or ticket collector in charge of the train took up their tickets, and returned in place thereof conductor's checks or tickets, the precise nature of which is not shown by the evidence; but we may assume, basing such assumption upon a common knowledge of the custom of railroad companies in such matters, that the tickets or checks returned to plaintiff were the ordinary checks given by conductors, and entitled the plaintiff to passage on that day and train only. On dis-

covering that plaintiff's eight year old son had no ticket, the conductor demanded that his fare be paid, or that he leave the train. Plaintiff refused to pay the fare, claiming that he was entitled to free passage under the contract with the Cleveland agent. The conductor refused to recognize such contract, and ejected the boy from the train as it was leaving the station at Minneapolis, but did not return his ticket to plaintiff, or offer to return it. The train was in motion at the time, but the boy was in no way injured. Upon the expulsion of his son, plaintiff left the train, and remained with him. Before doing so, he handed to his wife the conductor's checks or tickets given him in lieu of his tickets, and she continued on her journey with the other members of the party. Plaintiff and his son resumed their journey some four days later.

It is conceded that plaintiff had a ticket entitling him to passage on defendant's train to Hebron, and it may be conceded that his son, who was of fare-paying age, had no ticket and no right to a free passage; and we have for consideration the question whether the expulsion of the son from the train for the failure of the father to pay his fare, without first having returned, or offered to return, the latter's ticket, was a violation of the contract to carry the father to his destination, or such a wrong as to render it liable in damages. The father having entered the train with his son, who, as we have noted, was but eight years old, and having refused to pay his fare when demanded, the defendant had the lawful right to eject them both from the train. *Beckwith v. Cheshire*, 143 Mass. 68, 8 N. E. 875; *Lake Shore v. Orndorff*, 55 Oh. St. 589, 38 L. R. A. 140, and cases cited in the note. This is on the theory that, as the parent is in charge of the child who is non sui juris, the law implies a contract on his part to pay the child's fare, and, on his refusal to do so, both may be expelled from the train. *Philadelphia v. Hoefflich*, 62 Md. 300. There is no claim that plaintiff was personally expelled or removed from the train, or that he was requested or ordered to get off. The contention on his part in this respect is that the forcible removal of his son was, under the circumstances, a justification for his leaving the train, and, in effect, his removal as well as the removal of the son.

Counsel for defendant conceded on the argument that, if the

removal of the son was wrongful, it would operate as the removal of the father, but contended that, if the removal of the son was rightful, then such removal would not operate as the removal of the father. We cannot concur in this latter contention. The reason for the rule that the expulsion of the child operates as an expulsion of the parent is the same, whether applied to a case where the child may be lawfully and rightfully removed, or to a case where such removal is wrongful. The reason for the rule is found in the laws of humanity and nature. It is the parent's duty to care for and protect his child. There is an inseparable bond of unity between them. And to hold that where the child is forcibly removed and ejected from a railroad train in a strange city, among strangers, whether rightfully or wrongfully, the act of the parent in following the child is purely voluntary on his part, and that such removal of the child is not in effect the removal of the parent, would do violence to the sacred relations existing between parent and child, and the laws of humanity and nature. In such case the departure of the parent from the train is not voluntary in the sense that it is of his own choosing or of his own free will. On the contrary, the act of the railroad company in removing the child is the inducement, the cause, and it would be unreasonable to say that under such circumstances the parent left the train of his own free will. So we conclude that the ejection of a child of tender years from a railroad train for the failure of the parent in charge of and accompanying the child to pay its fare, whether rightful or wrongful, is in effect the ejection and removal of such parent. *Gibson v. East Tenn., V. & G. R. Co.*, 30 Fed. 904.

It remains to be considered whether the failure of defendant to return to plaintiff his ticket, or its unearned value, renders it liable to him in this action. The complaint is broad enough to sustain such recovery, and we believe the question is ruled by the case of *Wardwell v. Chicago, M. & St. P. Ry. Co.*, *supra*. It is there held that such failure to return the fare actually paid by the passenger renders the company liable. We quote from the opinion in that case, at page 517:

"As precedent to the right to expel him from the train, he [the

conductor] should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion."

It was not the duty of plaintiff to demand the return of his ticket before leaving the train, but, on the contrary, it was the duty of the conductor of the train to return it, or its equivalent, as a condition precedent to his right to eject him. *Bland v. Southern*, 55 Cal. 570. Nor is it important or material to the right of action that a ticket was subsequently furnished him, with which he continued his journey. *Wardwell v. Chicago, M. & St. P. Ry. Co.*, *supra*. It is not disputed but that defendant's conductor or collector took up plaintiff's ticket, returning to him a conductor's check; and it is not claimed that the original ticket was returned, or offered to be returned, before the boy was ejected. If, as suggested by a member of the court, the original ticket had been cancelled by the conductor, and thereby rendered worthless and of no value as an evidence of plaintiff's right of passage on a subsequent train, then it was the duty of defendant to return in lieu thereof its unearned value, or some evidence or token which would answer every purpose of the ticket uncanceled.

We are unable to distinguish this case, on principle, from the *Wardwell* case, and feel constrained to follow and apply the law there laid down. A verdict of \$200 was sustained in that case, and no reason occurs to us why the same amount should not be sustained in this case. We have examined all the assignments of error, and find none of sufficient consequence to warrant a new trial. The charge of the court that the jury might take into consideration the plaintiff's pecuniary condition, in reduction of damages,—for such is the effect of the charge,—was in defendant's favor, and furnishes no ground for complaint. The fact that the instruction on this subject was favorable to defendant was recognized by its counsel, as shown by the exception taken thereto, and no exception was taken because it was adverse to defendant's rights or interests.

The order appealed from is affirmed.

A motion for a rehearing having been made the following opinion was filed May 22, 1900:

**BROWN, J.**

In view of the vigor and earnestness shown in appellant's application for a reargument of this cause, we deem it not out of place to add just a word in denying it. The original opinion was prepared after such consultation and examination as the press of business before the court would warrant, and the statement there made concerning the custom of conductors in taking up tickets from passengers, and returning to them a substitute amounting to no more than an evidence that the passenger has paid his fare, was based on what we supposed and believed, and still suppose and believe, to be known to every person who has ever traveled on railroad trains. The authorities supporting us are numerous. *Isaacson v. New York*, 94 N. Y. 278; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Merchants v. Hall*, 83 N. Y. 338; *Gregory v. Wendell*, 39 Mich. 337; *Downey v. Hendrie*, 46 Mich. 498, 9 N. W. 828. "Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all." *Siner v. Great Western, L. R.* 4 Exch. 117, 123. And we may add, further, in taking final leave of the case, that the "conductor's exchange checks" appended to the application for reargument corroborate the assumption indulged in by the court. They expressly provide that they are good for one continuous passage to place of destination. And plaintiff, having begun his passage thereunder, was bound to continue it, otherwise the check would be invalid.

Application denied.

OLE S. THOMPSON v. MINNEAPOLIS & ST. LOUIS RAILROAD  
COMPANY.

May 9, 1900.

Nos. 12,059—(65).

**Verdict Sustained by Evidence.**Evidence examined, and *held* to sustain the verdict of the jury.

Action in the district court for Freeborn county to recover \$10,000 damages for personal injuries received while engaged in unloading wood from a car. The case was tried before Kingsley, J., and a jury, which rendered a verdict in favor of plaintiff for \$800. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*Albert E. Clarke*, for appellant.*Henry A. Morgan and Howard H. Dunn*, for respondent.BROWN, J.<sup>1</sup>

This cause is one to recover damages for injuries to the person of plaintiff, caused, as he alleges, by the carelessness and negligence of the defendant. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial. No questions of law are presented, and we have only to determine whether the verdict is justified by the evidence, and whether the damages awarded (\$800) are excessive. We have given the evidence a very careful reading and examination, and can find no reason for disturbing the verdict. The evidence on the questions presented is conflicting, the cause was submitted to the jury under very clear, full, and fair instructions, and the determination of the jury cannot be set aside without departing from the well-settled rule to the effect that a verdict will not be set aside by this court where it has been approved by the trial judge, except in cases where it is clearly and palpably against the evidence. Such is not this case. The damages seem quite large, but not so excessive as to warrant the conclusion that the jury was actuated by feelings of passion and prejudice.

Order affirmed.

<sup>1</sup> LOVELY, J., having been of counsel, took no part.



## CHARLES D. GOULD v. HELEN J. FULLER and Others.

May 9, 1900.

Nos. 12,094—(60).

**Corporation—Powers and Purposes.**

The powers of a corporation, and the purposes for which it is organized, must be determined by the articles of incorporation; and it can exercise no powers other than those therein specified, and such as may be incidental thereto.

**Mechanical Corporation—Laundry Business.**

A "general laundry business" is not a mechanical business, within the meaning of section 3, article 10, of the state constitution, and a corporation organized for that purpose does not come within the constitutional exemption there enacted.

In the matter of the assignment of Fuller's Laundry Company, a corporation, insolvent, pending in the district court for Hennepin county, plaintiff, as assignee of the insolvent, petitioned pursuant to Laws 1899, c. 272, that the court direct and levy an assessment on the stockholders. In answer to an order to show cause Helen J. Fuller and another appeared, and the application was heard before Simpson, J., who made an order granting the application, from which said Helen J. Fuller appealed. Affirmed.

*George R. Robinson*, for appellant.

*James D. Shearer*, for respondent.

BROWN, J.

Fuller's Laundry Company was organized as a corporation under the laws of this state on January 31, 1890. It became insolvent and unable to pay its debts, and on March 8, 1899, duly made an assignment for the benefit of its creditors to the respondent, who duly qualified and is now acting as assignee. The assets of the corporation being insufficient to pay its debts and expenses incurred in the administration of the trust, the assignee duly made application, under Laws 1899, c. 272, for an order and judgment assessing the stockholders of the corporation for the purpose of raising funds with which to pay such debts and expenses. The

court below made an order granting the application, and the stockholders appeal.

The only question presented is whether the insolvent corporation is one organized for mechanical purposes, within the meaning of section 3 of article 10 of the state constitution, and exempt from the liability thereby created. We answer the question in the negative. This section of the constitution is as follows:

"Each stockholder in any corporation [excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business] shall be liable to the amount of stock held or owned by him."

The question for what purpose this corporation was organized must be determined by the articles of incorporation, article 1 of which reads as follows:

"The name of this corporation shall be Fuller's Laundry Company. The general nature of its business shall be to operate a laundry or laundries, and to conduct a general laundry business."

At the hearing before the district court the stockholders offered in evidence certain affidavits tending to show that the corporation was associated with another corporation, expressly organized as a manufacturing corporation, and that part of its business was to complete articles of manufacture delivered to it by such other corporation. But such evidence was incompetent for any such purpose. The powers of a corporation, and the purposes for which it is organized, must be determined by the articles of incorporation; and it can exercise no other powers than those therein set out, and such as may be incidental thereto. 7 Am. & Eng. Enc. (2d Ed.) 695, and cases cited.

We do not deem it necessary to go into any discussion of the question as to the proper interpretation of this provision of the constitution, for we have no hesitation in holding that a corporation organized for the purpose of carrying on a "general laundry business" is neither a manufacturing nor a mechanical corporation, within the most liberal construction; nor is it "closely allied to, or incidental to, some kind of manufacturing business," within the meaning of *Cowling v. Zenith I. Co.*, 65 Minn. 263, 68 N. W. 48. It

follows that the court below correctly disposed of the case. We may add, in passing, that we are not disposed to extend the rule laid down in the Cowling case.

Order affirmed.

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MICHAEL FERCH v. VICTORIA ELEVATOR COMPANY.

May 11, 1900.

Nos. 11,925—(51).

**Grain—Laws 1895, c. 148, § 4, a Penal Statute.**

The requirements of Laws 1895, c. 148, § 4, providing for a recovery of one cent per bushel for the withholding of wheat from any person having a storage receipt, after demand, must be considered as penal in character; and it must be held that a strict compliance with all its terms and conditions is necessary to set the statute in motion.

**Demand.**

A demand upon the agent's son at the usual place of business of the agent did not constitute a proper demand of the agent or of the defendant in this case.

**Same—Evidence.**

The facts showing the attempted demand considered, and held insufficient for that purpose.

Action in the district court for Big Stone county to recover \$6,086.52 damages for refusal to deliver wheat pursuant to Laws 1895, c. 148, § 4. The case was tried before C. L. Brown, J., who at the close of plaintiff's testimony granted defendant's motion for a dismissal of the action. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*C. M. Ferguson* and *Thomas Kneeland*, for appellant.

*E. T. Young*, for respondent.

**LOVELY, J.<sup>1</sup>**

Action to recover over \$6,000 for the violation of the statute which provides that as against any person storing wheat under the

<sup>1</sup> BROWN, J., having tried this case when district judge, took no part.

warehouse laws of this state, who has issued storage receipts for the same,

"On the return or presentation of such receipts by the lawful holder thereof, properly indorsed, at the elevator or warehouse where the grain represented therein is made deliverable and upon the payment or tender of payment of all lawful charges, \* \* \* the grain shall be immediately delivered to the holder of such receipt, \* \* \* The grain represented by such receipt shall be delivered within twenty-four hours after such demand shall have been made and cars or vessels or other means of receiving the same from the elevator or warehouse shall have been furnished.

If not delivered upon such demand within twenty-four hours after such car, vessel or other means for receiving the same shall have been furnished, the warehouse in default shall be liable to the owner of such receipt for damages for such default, in the sum of one cent per bushel, and in addition thereto one cent per bushel for each and every day of such neglect or refusal to deliver." Laws 1895, c. 148, § 4.

The plaintiff had in store at the defendant's warehouse at Correll, in this state, upwards of 1,900 bushels of wheat. On July 31, 1896, plaintiff and one Woods, defendant's agent in charge of the warehouse, had a settlement for warehouse charges, and the proper storage receipts under the warehouse law were delivered to plaintiff. There had been a general clearing out of the wheat for the past season. The grain had all been shipped out of the elevator, and the term of Woods' service as general agent under his contract had expired on the day last mentioned. The agent, Woods, had a store adjoining the elevator, where he had previously transacted its business, as defendant's agent in paying off and settling with its customers, and continued to retain the keys of the elevator and to transact business for the defendant, with its consent, some time after August 1 following. On August 1, the day after the receipts were issued, the plaintiff made out a written demand for the wheat, and went to the elevator with the amount of charges for its storage, and the proper means of receiving and shipping the grain provided for in the statute. The elevator was closed and empty. Plaintiff then went to the store of Woods, in the absence of the latter, and, after nine o'clock at night, served a written demand for his wheat on Woods' minor son, who was temporarily in charge of

the store, also tendered to such minor sufficient money to pay the storage. The boy refused to receive the money, and plaintiff left it with the written demand on the counter. No other demand was ever made.

Upon proof of these facts, the trial court dismissed the action upon the ground that no proper demand to set the statute in operation had been made. A motion for a new trial was made and overruled. An appeal therefrom is taken to this court.

We agree with the learned trial court that the demand for the wheat was insufficient to set in motion this severe and rigorous statute, under which, by mere force of its operation, dependent upon demand, and the running of time thereafter, the defendant would, by its alleged default, not only be liable for the grain itself, which it afterwards paid for, but for something over \$6,000 for its refusal to deliver 1,900 bushels of wheat on demand. We are willing to go to the utmost limit, which reason will justify, to sustain the warehouse laws of this state; and, though the consequences may be severe for not complying with the statutory duty, such consequences for the refusal to comply therewith must be considered as a punishment, and the proof of demand should not be in doubt. Under the section of the statute referred to, the money claimed being in the nature of a penalty,—a severe one, if recoverable,—it must be held that the demand which is the basis for the penalty should be made in strict obedience to the statute. Clearly, in this case it was not so made.

Conceding that Woods was the agent of the defendant company, the warehouse being closed, and he being in occupation of his store, which was the usual place of business for the elevator, and having the keys at that place, a demand should at least have been made upon him personally, if it could have been done, and it does not seem in doubt but that it could, although the plaintiff might have been required to wait overnight, or for a day or two, to have served the written claim upon him. The boy of Woods had helped his father to some extent about the elevator, it is true, but was not the agent or subagent of the defendant, in any sense. Such a service of a summons in a civil action as was made in this case would not have been a good service on Woods personally, nor even a sub-

stituted service under the statute; and since the plaintiff, who adopted this method of service as the sole foundation of his claim, must rely upon such service to support it, it must be held that upon the proof of such demand the statute punishing the elevator company by inflicting upon it the severe penalty of one cent per bushel for every twenty-four hours of detention after demand, did not become operative.

The order appealed from is affirmed.

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ALBERTINE ABEL v. ALLEMANNIA BANK.

May 11, 1900.

Nos. 11,960—(43).

**Bank—Composition with Creditors.**

An agreement for a composition by the creditors of an insolvent bank, which upon its face implies co-operation of all to whom it is indebted, will not authorize the person to whom it is delivered to effect such composition to consent to any settlement not concurred in by all the creditors of such bank.

**Authority of Agent—Reorganization of Bank.**

The fact that, subsequent to the agreement referred to, a reorganization scheme, as provided by statute enacted after the agreement, was signed, cannot enlarge the authority derived from the same.

**Dismissal of Petition—Subsequent Judgment on Petition.**

A dismissal by the court of a petition for reorganization of a bank under Laws 1897, c. 89, without prejudice, disposes of the matter until it is reinstated upon notice to parties interested therein; and a subsequent judgment rendered on such petition is without merit, unless based upon the express consent of the parties interested.

**Reorganization—New Certificates of Deposit.**

The retention of new certificates under the terms of such reorganization by a person interested does not of itself amount to an acceptance of the terms of such scheme, where the corporation is seasonably notified that they are not accepted.

**Evidence.**

Evidence considered, and *held* that the judgment of reorganization was

no bar to plaintiff's claim, and that she is entitled to recover the full amount deposited by her in the bank.

Action in the district court for Ramsey county to recover \$1,326 and interest on a certificate of deposit. The case was tried before Bunn, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Affirmed.

*Nelson & Bramhall*, for appellant.

*Charles H. Taylor*, for respondent.

LOVELY, J.

The plaintiff was a depositor in the Allemannia Bank at the time it became insolvent and suspended business. This action is brought for the amount of her deposit, for which she should recover, unless bound by a judgment of the district court for Ramsey county in reorganization proceedings under Laws 1897, c. 89. The plaintiff, previous to the statute, signed a written instrument looking to a composition by the creditors of the bank, and delivered the same to Albert Scheffer, the president of such bank, upon which authority Scheffer acted for her in all subsequent proceedings, to which he consented for her, but of which she had no notice until after the final judgment in proceedings under the statute referred to, which it is now sought to interpose in bar of her claim to recover the amount of her deposit.

We may presume, what is too obvious to require discussion, that neither before nor subsequent to the passage of the statute (Laws 1897, c. 89) can a reorganization of an insolvent's estate, that impairs or reduces the amount of a creditor's obligation, be effected, so as to bind such creditor, without his consent; and in this case any claim upon the reorganization under the judgment must be based upon the instrument signed by plaintiff, and delivered by her to Scheffer, which it is urged binds her by the authority it invests in him as her agent.

Several months after this instrument was signed by plaintiff, the legislature provided, in Laws 1897, c. 89, for a statutory reorganization of an insolvent bank, when a majority of the creditors should petition for the same, to be secured by the judgment of the district court, rendered upon previous notice to each of the

interested parties. Nothing was attempted in the way of reorganization in this case until after the act of the legislature referred to, when a petition of a majority in number and amount of the creditors (although a large minority were not represented) was filed in the district court, and proceedings had to obtain the benefits of the statute. In these proceedings Scheffer, as above stated, assumed to act for plaintiff, and others, as the committee of the petitioners provided for in the statute. Proceedings were then duly taken under the statute to secure such reorganization, and a formal application was made before one of the judges of the Ramsey county bench by the petitioners, through Scheffer, as their committee, to remove the receiver in insolvency, who was then in the possession of the bank, and to take further action therein for reorganization. This petition, after hearing, was denied, without prejudice to renewal of the same. The order denying the petition was lost, but afterwards supplied. In the meantime another member of the Ramsey county bench, supposing that the original petition contained an order for a continuance of the reorganization plan, took up the matter; and such further proceedings (without new notice to plaintiff and other creditors) were had as resulted in a final judgment affecting the plaintiff's rights, providing she was either actually or impliedly a party to the same, or gave her assent thereto, through Scheffer. After the judgment of reorganization had been filed under the direction of the court, there were mailed to plaintiff five certificates, complying in all respects with the terms of the judgment for reorganization.

Scheffer, who represented plaintiff, as we have seen, derived his authority to do so by virtue of a written instrument, printed, and obviously one of many others apparently prepared to be signed by the creditors of the Allemannia Bank. This agreement reads as follows:

"Agreement of Creditors.

"St. Paul, Minn., January 11, 1897.

"We, the undersigned depositors and creditors of the Allemannia Bank of St. Paul, for the purpose of effecting a reopening of said bank, hereby agree with said bank, and with each other, that we will accept in payment of the amounts due us from said bank, which are respectively set opposite our names hereinafter, cer-



tificates of deposit of said bank, or its successor in case of a reorganization, payable in five annual instalments of twenty per cent. each, to bear interest at two per cent. per annum, and to be dated on the day of the reopening of said bank.

Names.	Amounts.
Albertine Abel	\$1,326 00"

No other name than plaintiff's was signed to this paper, and, though a few others of similar import were shown to her at the time she affixed her signature to it, we are clear that in view of its terms, and the manner in which it was executed, its consideration was for a joint and universal action of all the creditors of the bank. It is what is usually termed an "agreement for a common-law composition," and applies to all the creditors, not a part or even a majority of them; and a reorganization composed of less than all of the creditors of the bank, leaving a material number to obtain preferences as to terms of settlement, or to sue for their whole claims, as they might do if uncontrolled by an agreement to commute, is not to be drawn from the tenor or substance of this obligation, for no effort at construction can interpret the words "the creditors" to mean a part, or practically less than the whole. And, as a necessary corollary to this conclusion, the agreement could not and did not authorize Scheffer to consent for plaintiff, in her name, to a composition or plan for reorganization in which she would participate in the new scheme with a majority thereof, as provided for in the subsequent statute of 1897.

It is not necessary to consider the effect of the action of Scheffer, leading to the dismissal of the reorganization proceedings by the court below. They were terminated, and could not be renewed without leave of court; and although in the subsequent proceedings, instituted without notice, as required by statute, plaintiff was represented by Scheffer, his only authority to bind her was the written instrument referred to, and for the reasons stated it was insufficient. When the five certificates which the judgment provided for creditors consenting to the reorganization were sent to her, within a reasonable time thereafter she notified the bank that she was dissatisfied with the settlement, and caused her attorney to do the same, and then commenced this suit to recover

from the bank the amount of her deposit. We hold that not having directly, or through her agent, authorized the proceedings for the statutory reorganization, plaintiff is not bound by the judgment entered therein.

When the certificates delivered to plaintiff are returned into court to be cancelled, judgment may be entered in her favor according to the order of the court below. It is so ordered.

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WESTERN LAND ASSOCIATION v. JAMES W. THOMPSON and Others.

May 11, 1900.

Nos. 11,962—(68).

**Ejectment—Second Trial—Payment of Damages.**

There must be a specific recovery of the damages found in a judgment for the recovery of real estate, to require a payment thereof, in order to secure a second trial of such action under G. S. 1894, § 5845.

**Same—Set-Off of Damages against Improvements.**

*Held*, upon the facts in this case, that the defendants in ejectment were entitled to a second trial upon payment of the costs and disbursements, and a proper demand in accordance with law, for the reason that the damages found had been offset against the improvements, and no execution could issue therefor.

Action in the district court for St. Louis county to recover possession of real property and for \$1,200 damages for detention of the premises. The case was tried before Cant, J., who made findings pursuant to which judgment was entered as set forth in the opinion. From an order setting aside defendants' demand for a second trial, and also from an order amending the pleadings, findings, and judgment and all other proceedings by adding to the name of plaintiff the words "of Minnesota," defendants appealed. Reversed.

*I. Grettum*, for appellants.

*Fryberger & Johanson*, for respondent.

LOVELY, J.

Plaintiff brought suit to recover a city lot in Duluth from de-

fendants, who set up valuable improvements thereon under the occupying claimant's act (G. S. 1894, § 5849, et seq.).

The action was tried without a jury, and upon the findings of the trial court, who estimated the defendants' improvements (being the value of the yearly rental for the entire period allowed by law, as well as the value of the land without the improvements), a judgment was entered providing that execution should not issue until one year after the entry thereof, unless within that time defendants should pay into court the amount of the improvements, less the sum of \$210, which had been determined as the amount of the rental value or damages during the entire period for which they had been assessed. It was also adjudged that the value of the land without the improvements was \$846, and that within thirty days after the entry of judgment the plaintiff might demand in writing of the defendants payment into court of such sum, less taxes and assessments, in which case defendants should have their title confirmed, but, upon a failure, be barred of any right in the property, and that execution then issue therefor. It is nowhere in such judgment provided that any sum be recovered as damages in any other way, or that execution issue therefor, than as above, although the judgment finds that plaintiff has sustained such damages in the sum of \$210, which is the sum previously set off pro tanto against the improvements, and reduces the amount thereof upon which execution in a certain event is to issue, as provided in the previous terms of the judgment.

After judgment the costs and disbursements were duly taxed. Within six months after notice of the judgment the defendants tendered the plaintiff the full amount of the costs and disbursements as taxed, and demanded a second trial, under G. S. 1894, § 5845, which provides that

"Any person against whom a judgment is recovered in an action for the recovery of real property, may, within six months after written notice of such judgment, upon payment of all costs and damages recovered thereby, demand another trial, by notice," etc.

It was claimed by plaintiff that the demand was insufficient, because defendants did not pay the amount of the damages sustained. This view was adopted by the learned trial court, from

whose order setting aside such demand this appeal is taken. We do not agree to this view. The rental value of the premises had been, in the very terms of the judgment, offset against the improvements, for which, less that sum, execution could not, by its terms, issue for a year; and there is elsewhere in the judgment no provision for their recovery in any other way, or for the execution to issue therefor in any event. It may be that this difficulty arose from embodying in the judgment the legal results which follow as a matter of law upon a recovery of improvements in the occupying claimant's act, referred to; but, as there is no judgment for the recovery of such damages as the provisions in the ejectment statute require to secure second trial, the payment of the costs was sufficient to entitle defendants to a second trial.

We agree with the learned trial court that it had the power to amend the pleadings, and judgment, under G. S. 1894, § 5267, in this case, by adding to the designation of plaintiff's name, "Western Land Association," the words "of Minnesota."

Order reversed, and case remanded for further proceedings.

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WALTER CHARRON v. PINE TREE LUMBER COMPANY.

May 11, 1900.

Nos. 12,026—(205).

**Work and Labor—Error to Direct Verdict.**

Evidence considered, and *held* that the trial court should have submitted the issues of fact in this case to the jury, and that the direction for a verdict in favor of the plaintiff for the amount demanded in the complaint was error.

Action in the district court for Morrison county to recover \$52.05 and interest for the services of a man and team furnished to defendant at its request. The case was tried before Searle, J., who directed a verdict in favor of plaintiff for the amount demanded. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

*Lindbergh & Blanchard*, for appellant.

*Nathan Richardson* and *John W. White*, for respondent.

LOVELY, J.

Action to recover for the labor and services of a man and team, alleged to have been furnished to defendant between specified dates. The issue, as litigated, was whether these services were furnished by and belonged to plaintiff, who was the owner of the team and son of the person who performed the services (one Henry Charron), or whether the hiring and employment of the father was in fact a contract between such father and defendant. It was also an important question, in view of the disposition of the case, whether during the time such services were rendered the defendant had any knowledge that the compensation for the services of Henry Charron (the father) belonged to his son. The case was tried to a jury, and at the close of the evidence the court directed a verdict in favor of the plaintiff for the full amount claimed. Defendant moved for judgment, or, in the alternative of its denial, for a new trial, which motion was denied, and from the denial of the order as a whole this appeal is taken.

The facts disclosed by the evidence reasonably tend to show that plaintiff was the son of Henry Charron, and that they lived together. The son owned a team, which he hired to his father; and upon the statement of himself and father both made an arrangement whereby the use of such team and the services of the father should belong to the son. The father then hired out to the defendant, and worked for the latter several months. The transaction constituting the contract of hiring was between the father and the yard superintendent of defendant company. In this transaction the father, who had previously worked for defendant, concededly for himself, did not disclose the fact that the services he was to render belonged to the son. The father collected the wages due, and claims to have passed them over to the son from time to time. All transactions between the father and the company were ostensibly in the name of the father, except that the defendant's timekeeper, who had no other duties to perform than to keep the time of the laborers at work for the company, testified that he had

been told by the father, before the hiring, that he was working for his son. The timekeeper, however, was not requested to tell the defendant of this fact, and never furnished information thereof to the company, or any servant authorized to act upon such knowledge, and in fact entered the time of Henry Charron (the father) in his own name.

Henry Charron was indebted to a third party, who levied upon his wages, and the company paid over the same on execution to the judgment creditor. After the evidence tending to show these facts had been received, and plaintiff had rested, the defendant offered as evidence the judgment roll in the suit against the father, also the levy by execution therein upon his wages, to justify its payment of the same to the judgment creditor. This evidence was excluded by the court. We think the learned trial court erred in refusing to submit the issue upon the ownership of the claim for wages and of notice thereof to the defendant, as well as upon the refusal to receive evidence of the judgment and execution against Henry Charron.

That the father was indebted to third parties; that the real agreement of hiring was wholly between himself and the defendant; that he drew the pay in his own name, without giving any information to his employer of what he afterwards claimed to be the real facts, might furnish a view of the situation indicating a doubt as to the agreement between father and son and suggest reasons to question the same sufficient to require the submission to a jury of this issue,—seems quite clear. The notice to the timekeeper, whose duty was not to receive or transmit the real facts concerning the relations of these parties to the defendant, as well as the credibility of his statements made against his actual entry of different facts on his time book, would not be a notice to the company which would bind defendant. And if the father hired out, and received money in his own name, with the consent of his undisclosed principal, the defendant was not to be prejudiced by acting upon its actual knowledge, and the judgment in favor of the execution creditor upon a proper levy was binding upon it, and this evidence should have been received.

Order reversed, and a new trial granted.

## STATE v. JOSEPH PALMER.

May 14, 1900.

Nos. 12,021—(13).

79	428
182	211

**Grand Larceny—Evidence—Former Attorney for Defendant.**

On the trial of the defendant for stealing a pocketbook containing \$13.75 from a dwelling house, the state called a witness who testified that he found the pocketbook and returned it to the owner. The state, over the objection of the defendant, was then permitted to show by the witness that he was the attorney of the defendant in this case, and that three days after the pocketbook was returned, and on the day first set for the hearing of the case before the magistrate, he withdrew from the defense. *Held* prejudicial error.

**Conspiracy—Declaration of Alleged Co-conspirator.**

After the foundation therefor has been laid by the introduction of evidence sufficient, *prima facie*, to justify a finding by a jury of a conspiracy to commit a crime, the acts and declarations of each conspirator are admissible in evidence against each and all of his co-conspirators, if such acts and declarations were in furtherance of the common purpose. Care, however, must be taken that the declarations or acts thus admitted be those only which were made or done during the pendency of the criminal enterprise, and in furtherance of its objects. Rule applied, and *held*, that the trial court erred in receiving in evidence the declarations of the defendant's alleged co-conspirator.

Defendant was indicted in the district court for Wright county for grand larceny in the second degree. The case was tried before Giddings, J., and a jury, which rendered a verdict of guilty. From a judgment by which defendant was sentenced to be confined in the state reformatory, he appealed. *Reversed*.

*W. H. Cutting*, for appellant.

*W. B. Douglas*, Attorney General, and *C. A. Pidgeon*, County Attorney, for respondent.

**START, C. J.**

The defendant was convicted of the crime of grand larceny in the second degree in the district court of Wright county, and sentenced to the state reformatory at St. Cloud. He appealed from

the judgment. He assigns thirty-three errors, but we shall consider only two of them.

The defendant was charged with having stolen on Monday, July 17, 1899, from the dwelling house of Levi H. Webster his pocketbook which contained a ten-dollar bill and \$3.75 in silver. That the larceny was committed by some one is unquestioned. The state called as a witness Mr. C. M. King, who testified that the day after the defendant was arrested he found a pocketbook, which the evidence tends to show was the one stolen, in which there was a ten-dollar bill, and returned it to Mr. Webster on July 18, and that he was a lawyer. He then testified, over the objection and exception of the defendant, as follows:

"Q. Were you acting in that capacity for the defendant at that time,—from the 18th to the 21st? (Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.) A. Well, I don't know whether I was or not at the time that I returned the pocketbook. I was his attorney from the 18th to the 20th of July. Q. When did you cease to act as his attorney? (Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.) A. On the 21st,—at the end of the day. The Court: That was the day of the first hearing? A. Yes, sir; that is the day that the hearing was set for, but there was an adjournment until the 25th. It was the day of the first hearing that I withdrew from the case."

This was reversible error, for the evidence was to the effect that the witness was the attorney of the defendant when he found and returned the stolen pocketbook, and that thereafter, and on the day first set for the defendant's hearing, he withdrew from his defense. This evidence was clearly immaterial, and no reason is or can be assigned why it was proper or fair to receive it against the protest of the defendant. It is true that it was competent for the state to trace the stolen property by showing that it had been found and returned to the true owner, but what relevancy to the history of the pocketbook after it was stolen was the fact that the witness who found and returned it was the defendant's attorney, and that he then withdrew from his defense? The natural tendency of the evidence was to prejudice the defendant's cause, for the jury might well infer from it that the defendant's attorney,



having found the stolen property, knew or believed him guilty, and therefore declined to defend him.

The other assignment of error to be considered relates to the ruling of the trial court in receiving the evidence of certain admissions and statements of Miss Hattie Baldwin, who was at the house of the complaining witness when the property was stolen, and who was married to the defendant August 16 thereafter. These admissions or statements made to the witness in the absence of the defendant two days after the larceny were to the effect that the defendant stole the money and hid it; that she would show the witness where it was, and went with him to find it, but they did not find it. This evidence as to the statements of Miss Baldwin was admitted by the trial court upon the theory of an existing conspiracy, at the time the statements were made, between her and the defendant.

The rule is well settled that after the foundation therefor has been laid by the introduction of evidence sufficient *prima facie* to justify a finding by the jury of a conspiracy to commit a crime or actionable wrong, the acts and declarations of each conspirator are admissible in evidence against each and all of his co-conspirators, if such acts or declarations were in furtherance of the common purpose. Care, however, must be taken that the declarations or acts thus admitted be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period, they are merely a narrative of past occurrences, and are not admissible in evidence except against the party making them. 1 Greenleaf, Ev. § 111; 6 Am. & Eng. Enc. (2d Ed.) 866; State v. Thaden, 43 Minn. 253, 45 N. W. 447; Baker v. State, 80 Wis. 416, 418, 50 N. W. 518.

The admission of the evidence complained of in this case cannot be sustained without a violation of the rule we have stated. The statements of Miss Baldwin were made two days after the larceny was committed, but the state claims that there was evidence in the case sufficient to establish *prima facie* a conspiracy between the defendant and Miss Baldwin to steal the pocketbook and divide the money; and as the pocketbook, with ten dollars of the money therein, was found after her statements were made, it follows that

there had been no division of the money; hence the conspiracy had not been carried into full effect when the statements were made, and her statements were admissible against the defendant. There are two conclusive answers to this claim: (a) Her statements and declarations were not made in furtherance of the common purpose of the alleged conspiracy, or with reference to future contemplated acts to enable the conspirators to consummate their purpose (see *State v. Thaden*, 43 Minn. 253, 258, 45 N. W. 447), but were simply the narration of a past transaction, to the effect that the defendant stole and hid the money. (b) The evidence, while it tended to show that, if the defendant stole the money, Miss Baldwin was an accessory after the fact, yet it is wholly insufficient to establish *prima facie* that she and the defendant entered into a conspiracy to steal and divide the money. It was error to receive in evidence her statements made to a third party in the absence of the defendant.

Judgment reversed, and a new trial granted.

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ANDREW FLOBERG v. FAY S. JOSLIN.

May 14, 1900.

Nos. 12,024—(129).

**Findings Sustained by Evidence.**

*Held*, that the evidence sustains the findings of fact of the trial court.

Action in the district court for Clay county for an accounting and for a reconveyance of certain land. The case was tried before Baxter, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*F. H. Peterson*, for appellant.

*C. E. Joslin* and *M. L. Countryman*, for respondent.

**START, C. J.**

This was an action to obtain an accounting as to the amount due by the plaintiff to the defendant by reason of certain mortgages upon the real estate described in the complaint, and a decree di-

recting the defendant to convey the mortgaged premises to the plaintiff on payment of the amount found due on such accounting. The facts alleged in the complaint are summarized in the opinion of this court in disposing of a former appeal in this case, and they need not be here repeated. See *Floberg v. Joslin*, 75 Minn. 75, 77 N. W. 557. The answer put in issue the material allegations of the complaint upon which the plaintiff based his claim to an accounting and a right to redeem the real estate from the mortgage liens, and contained allegations of new matter which, if true, established the inequity of plaintiff's claim. The findings of fact by the trial court were general, and to the effect that all of the allegations of the complaint not admitted by the answer were not sustained by the evidence, and that all of the allegations of new matter in the answer were in all respects true, and ordered judgment for the defendant. The plaintiff appealed from an order denying his motion for a new trial.

The only question for our decision is the general one whether the findings of fact are sustained by the evidence. The parties agree that in December, 1892, the plaintiff was the owner of 320 acres of land, subject to seven mortgages thereon, one of which was for \$908.35 to the defendant; that the plaintiff then gave to the defendant a new mortgage on the land for \$3,664 to secure the debt due to the defendant and money advanced and to be advanced to take up and discharge certain of the other mortgages then on the land; and that the plaintiff also assigned a lease of the land for the term of five years to the defendant as further security. They disagree radically as to other matters. The plaintiff alleged in his complaint, and such was his contention on the trial, that the defendant agreed to take and hold the land, by virtue of the lease, in trust for the plaintiff, for five years, and to protect the land,—that is the plaintiff's title thereto,—in the meantime, from all of the incumbrances thereon; that the defendant, in violation of the trust, purchased certain of the mortgages in her own name, which she foreclosed, and now claims to hold the absolute title by virtue thereof. This was denied by the defendant, but she admitted that she agreed conditionally to take up three of the mortgages on the

land, and claimed that the plaintiff never performed the conditions.

It is apparent that one of the controlling questions in the case was whether the defendant did agree to take and hold the land in trust, and protect plaintiff's legal title from loss by reason of the incumbrances thereon. The evidence on this and other questions is voluminous, and somewhat complicated, and it will serve no practical purpose to here analyze it. We have attentively considered it, and reached the conclusion that, while the trial court might have found for the plaintiff on the controlling questions of the case, yet upon the whole record we are satisfied that substantial justice has been done, and that the findings are fairly sustained by the evidence. The plaintiff's application to amend his complaint was properly denied. The complaint stated a cause of action, and the proposed amendment added nothing of substance to it.

Order affirmed.

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E. B. ANDERSON v. W. H. PRINGLE and Others.

May 14, 1900.

Nos. 12,056—(92).

79	433
82	218
79	433
86	388

### **Contract—Substantial Performance.**

The doctrine of substantial performance of a building or other contract, where of necessity the owner of the structure must retain the benefits of the contract so far as it has been performed, does not apply where, as in this case, the deviations from the terms of the contract are so substantial that an allowance out of the contract price would not give the owner substantially what he contracted for.

Action in the district court for Polk county to recover \$124.99 for labor and materials, and to foreclose a mechanic's lien therefor. The case was tried before Watts, J., who found that plaintiff was entitled to recover against defendants Grover and Jacobi in the sum of \$60. From a judgment entered pursuant to the findings, those defendants appealed. Reversed.

79 M.—28

*Grover & Massee*, for appellants.

*R. J. Montague*, for respondent.

START, C. J.

This action was brought to establish and foreclose a mechanic's lien on the premises described in the complaint. The plaintiff's lien claim was abandoned by him on the trial, and the action then proceeded as one for the recovery of money only for materials furnished and services rendered by the plaintiff to the defendants E. J. Grover and G. R. Jacobi pursuant to an express contract between them. The trial court made its findings of fact and conclusions of law, and ordered judgment against the defendants named for \$60 and interest. They appealed from the judgment so entered.

One of the defenses relied upon by the defendants was that the contract upon which the plaintiff's claim against them was based was an entire contract, and that the plaintiff had not performed it. Upon this issue the trial court found, in effect, that on October 12, 1898, the parties made a contract whereby the plaintiff agreed to raise and level the store building of the defendants, furnish plank for footing of cellar sill, square the cellar, stud and board it in, put sill in center of the store, and replace the sidewalk as it was when the work began; for all of which the defendants agreed to pay him \$100. That the plaintiff furnished the materials required, and substantially performed the work, but he did not level the building in a proper manner; that the cost of so leveling the building would be \$40; and that the reasonable value of the plaintiff's services and materials furnished in the prosecution of the work is \$60. The contention of the defendants is that the undisputed evidence in the case, and the findings of the court as well, conclusively show that the plaintiff did not substantially perform his contract, and therefore the court erred in ordering judgment for the reasonable value of his part performance of the contract.

The rule as to substantial performance of a building or other contract, where of necessity the owner of the structure must retain the benefits of the contract in so far as it may have been performed, is well settled in this state. The rule is that, where a contractor has in good faith made substantial performance of the

terms of the contract, but there are some slight omissions or defects, which are readily remedied, so that an allowance therefor out of the contract price will give the other party in substance what he bargained for, the contractor may recover the contract price, less the damages on account of the omissions. But this rule of substantial compliance does not apply where the omissions or deviations from the terms of the contract or its performance are so substantial that an allowance out of the contract price would not give the owner essentially what he contracted for. *O'Dea v. City of Winona*, 41 Minn. 424, 43 N. W. 97; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845.

The plaintiff claims that there was a substantial performance of the contract within the rule stated. It is manifest from the findings and the evidence that there was not. The trial court found that the plaintiff performed only sixty per cent. of his contract, and that the nonperformance related to the leveling of the building. The undisputed evidence shows that the leveling of the building was the result sought by the defendants in entering into the contract. The raising of the building and the furnishing of the materials were merely incidental to the attainment of this object. Therefore the facts found by the court, when read in the light of the evidence, show that the nonperformance of the contract by the plaintiff was not slight or casual, but that it was of a substantial nature, and of such extent that an allowance out of the contract price would not give the defendants essentially what they contracted for. The doctrine of substantial performance is, if not strictly logical, equitable and wholesome. Its purpose is to secure substantial justice between man and man by relaxing in proper cases the rigid, and, in practice, sometimes harsh, rule as to the entirety of contracts. While we regret the necessity of reversing a case of the character of this one, and especially so where the amount involved is so small, we cannot hold that there was a substantial compliance with the contract in this case without establishing a precedent which will enable parties to contracts to

abandon them, and recover on a quantum meruit, whenever they may find it for their interest to do so.

Judgment reversed, and a new trial granted.

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HUGH GALBRAITH v. JOSEPH YATES and Others.

May 14, 1900.

Nos. 12,074—(135),

79 436  
86 365

**Obstructing Road Ditch—Surface Water.**

In an action to restrain the defendants from obstructing a road ditch whereby the surface water collected by the ditch is set back and thrown upon the plaintiff's land, *held*, that the findings of fact by the trial court justify its conclusions of law to the effect that the plaintiff is entitled to judgment restraining such act, and for his damages.

Action in the district court for Polk county to restrain defendants from obstructing a ditch, and to recover \$150 damages for obstructing the same. The case was tried before Watts, J., who found that plaintiff was entitled to the relief demanded and to \$50 damages. From a judgment entered pursuant to the findings, defendants appealed. Affirmed.

*H. Steenerson* and *W. E. Rowe*, for appellants.

*A. R. Holston* and *L. E. Gossman*, for respondent.

START, C. J.

This action was brought to restrain the defendants from obstructing a road ditch which runs along the north side of a town line highway between the towns of Andover and Hammond, in the county of Polk, at a point near the southeast corner of section 33 in the former town. The plaintiff's land abuts the highway on its south side, and that of the defendants on its north side. The plaintiff's land lies east of the point of obstruction, and that of the defendants to the west thereof. The plaintiff had judgment in the district court, from which the defendants appealed. The record in this court contains no settled "case" or bill of exceptions, and the question for this court to decide is whether the findings of fact of the trial court are sufficient to sustain its conclusions of law.

The here material facts found by the trial court are these: The highway in question was duly laid out and established on the town line between the two towns in the year 1885, and has ever since been a public highway. Since that date, and prior to April 13, 1899, a grade, and continuous ditches to make and improve the same, have been made upon the highway by the authority and direction of the board of supervisors of the town of Andover. The ditch on the north side of the grade, in time of heavy rains, accumulates large quantities of surface water, and carries it westward, in which direction it would not otherwise run in large quantities. This ditch on the north side of the highway could not be made continuous without diverting surface water from its natural course, and carrying it upon the land of the defendants in section 32 of the town of Andover, and thereby injuring it. The maintaining of this highway with a continuous ditch along the north side thereof, as constructed by the town of Andover, has the effect of carrying surface water from a large tract of country to the south and east of section 32 in the town of Andover upon that section where it would not otherwise go, and where there is no natural and sufficient outlet, and, if left open, would submerge part of the land of section 32, and damage the same to a considerable extent.

For about two years prior to April, 1899, at a point near the southeast corner of section 32 in the town of Andover, near the northwest corner of plaintiff's land, the ditch on the north side of the highway had been filled up by defendants without any authority so to do, making a dam therein, which caused the water coming through the ditch to back up. The placing and maintenance of a dam in the north-side ditch has the effect of improving the highway to the west of it, but the benefit to that is less than the injury to that part of the highway which is east of such dam. None of the defendants have received any authority from the board of supervisors of the towns of Hammond or Andover to obstruct the flow of water in the ditch.

The defendant Andrew Anderson was during the whole of the month of April, 1899, an overseer of highways of the town of Andover, duly elected and qualified, and the locus in quo was within his road district. Some time during that month, but prior to the



13th day thereof, the plaintiff entered upon such highway, and removed the dam, and opened the ditch, and thereby caused the water collected by the ditch to flow westerly and northerly over and upon the land of the defendants. Thereupon, and on the day last named, the defendant Andrew Anderson, claiming to act as such overseer of highways, entered upon the highway with the other defendants herein, and caused the dam so removed from the ditch by the plaintiff to be put in again so that the ditch was obstructed in the same manner as it was when he assumed the duties of overseer of highways. The defendant Andrew Anderson deemed the retention of the obstruction or dam in the ditch necessary in order to protect his own and other lands to the west thereof from being flooded and injured by water carried by the ditch in large quantities, where, but for the construction of the ditch, it would not have gone. The defendant Andrew Anderson, in replacing the dam or obstruction in the ditch, had no other authority than was possessed by him as overseer of highways. The town board of supervisors of the town of Andover had taken no action with reference to the obstruction in the ditch, either at the time it was removed by the plaintiff or at the time it was replaced by the defendants. The replacing of the dam in the ditch obstructed the flow of the water in the ditch, and caused it to overflow the highway, and flood the plaintiff's land, and from this cause he has sustained damages to the commencement of this action to the amount of \$50. The maintenance of the dam by defendants would be a continuing injury to the plaintiff by reason of his land being flooded, for which he has not an adequate remedy at law, and would cause a multiplicity of actions.

As conclusions of law the trial court found that the plaintiff was entitled to judgment for \$50 damages, and, further, that each of the defendants be enjoined from obstructing the ditch in question, and from interfering with the removal of the dam placed therein by them until they are authorized by the board of supervisors of the proper town so to do.

Do the facts found justify this conclusion of law? The defendants claim that they do not for the following reasons:

1. The diversion of the surface water by the towns by means of

the continuous ditch in question, as stated in the findings of fact, was in itself wrongful and unlawful. It is true, as the defendants claim, that if towns and municipal corporations, in constructing roads and streets, accumulate surface water, it is their duty to take care of it, if reasonably practicable, and prevent its injuring others. But the presumption, in the absence of evidence or finding to the contrary, is that the public officers charged with the duty of constructing the road ditch in question did their duty in the premises, and did not unnecessarily divert the surface waters. The findings do not, as the defendants seem to claim, show the contrary, or that the town, in building and maintaining the ditch, unnecessarily made it continuous, and thereby wrongfully collected and discharged the surface waters upon the defendants' land. On the contrary, the court found that the ditch, as constructed, was for the improvement of the road, and that it is of greater benefit to the road as a whole, if unobstructed, than it would be with the dam placed therein by the defendants. The findings of fact do not show that the road and ditch were negligently or improperly constructed and maintained by the town, and, when read as a whole, they justify the conclusion that the continuous ditch was an essential part of the highway, and lawfully constructed and maintained by the town.

2. That the act of the defendants in placing the dam in the ditch some two years before it was removed by the plaintiff was lawful. This proposition necessarily rests upon the claim that the continuous ditch was unlawful as to them. It being a lawful public structure, it follows that the act of the defendants in obstructing it was unlawful, as found by the trial court.

3. That, the public authorities having permitted the dam to remain in the ditch for some two years after the defendants placed it therein, the defendant Anderson was authorized, as overseer of highways, to replace it when the plaintiff removed it as an obstruction from the ditch. It is unnecessary to discuss the general powers and duties of such officers, for it is clear from the findings that the act of the defendants in restoring the obstruction was unlawful, although the defendant Anderson happened at the time to be such overseer, because, as we have stated, the dam, when orig-

inally placed in the ditch by the defendants, was and remained, until removed, an unlawful obstruction. Such being the case, the replacing of the dam by the defendants was also wrongful.

4. That the findings as to the amount of the plaintiff's damages and the continuing character of the injury to his land are not sufficiently specific to justify the judgment. We hold that they are.

Judgment affirmed.

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AMELIA RADKE v. ERNEST KOLBE.

May 14, 1900.

Nos. 12,106—(80).

**Slander—Words Implying a Criminal Charge.**

To render words spoken of or concerning a person actionable per se, they must in themselves, in the absence of averments of extrinsic facts, impute or imply a criminal charge. It is not essential that they necessarily bear a criminal import; for the test is whether, in the ordinary acceptation of the language, a person could reasonably doubt its alleged signification.

**Same—Words not Actionable per se.**

Rule applied, and *held*, that the words, spoken of a married woman. "Mr. R. had to work awful hard on the section every day, and his woman went some nights with other men folks," were not actionable per se.

Action in the district court for Faribault county to recover \$5,000 damages for slander. The case was tried before Quinn, J., and a jury, which rendered a verdict in favor of plaintiff for \$150. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

*Thomas M. Koegun and Frank E. Putnam*, for appellant.

*C. N. Andrews*, for respondent.

**START, C. J.**

Action for slander. The plaintiff had a verdict for \$150, and the defendant appealed from an order denying his alternative motion for judgment or a new trial pursuant to Laws 1895, c. 320. The only question necessary to be decided in order to dispose of

this appeal is whether the complaint states a cause of action. The here material allegations of the complaint are these:

"That during all time hereinafter mentioned plaintiff has been, and now is, wife of John Radke. That on, to wit, the 15th day of September, 1897, at town of Byron, county of Waseca, Minnesota, the defendant, in the presence and hearing of one Albert Besser and Mrs. Manthey, maliciously spoke in German of and concerning the plaintiff the false and defamatory words following: 'Mister Radke hatte sehr hart zu arbeiten jeden Tag an der Section, und seine Frau ging zu verschiedenen Malen Nachts aus mit anderen Männern. *Sie ist eine schmutzige Sau*,'—which said words mean and say, in the English language: 'Mr. Radke had to work awful hard on the section every day, and his woman went some nights with other men folks. *She is a dirty sow*;' thereby meaning, and intending to mean, that plaintiff was not virtuous, was low and brutish in her character, and kept the company of other men, nights, instead of that of her husband, John Radke. That said Albert Besser and Mrs. Manthey at said time and place heard and understood the language used, and the meaning of the same."

There were no allegations of special damages. There was no proof on the trial of his speaking the words we have italicized, at the time and in the presence of the parties stated in the complaint. Hence they must be eliminated therefrom for the purposes of this appeal.

To render words, spoken of or concerning a person, actionable per se, they must in themselves, in the absence, as in this case, of averments of extrinsic facts, impute or imply a criminal charge. It is not essential, however, that they necessarily bear a criminal import; for the test is whether, in the ordinary acceptance of the language, a person could reasonably doubt its alleged signification. *Stroebel v. Whitney*, 31 Minn. 384, 18 N. W. 98; *Schmidt v. Witherick*, 29 Minn. 156, 12 N. W. 448. If words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of some extraneous fact, such fact must be alleged in a traversable form. The innuendo is not sufficient for that purpose, for it cannot enlarge the meaning of the words beyond their natural import. *Richmond v. Post*, 69 Minn. 457, 72 N. W. 704.

Reading the allegations of the complaint in the light of these elementary rules, it is clear that the complaint does not state a cause of action. The alleged words do not in themselves impute

to the plaintiff the commission of a crime. In the ordinary acceptance of the language, a person could reasonably doubt its alleged signification; for a married woman may go out nights with other men without justly subjecting herself to the charge of unchastity or adultery. It follows that the order appealed from must be reversed. It is not a case where judgment absolute should be entered for the defendant, for the plaintiff may be able to satisfy the trial court that she ought to be permitted to amend her complaint.

Order reversed, and a new trial granted.

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MIDWAY COMPANY v. FRANK W. EATON and Others.<sup>1</sup>

May 16, 1900.

Nos. 11,980—(150).

**Public Land—Location of Half-Breed Scrip—Secretary of the Interior.**

By virtue of the act of congress of July 17, 1854 (10 St. 304), there was issued to one Orillie Moreau, a mixed blood of the Sioux nation, five pieces of what is known as "half-breed scrip"; one of these pieces, for 160 acres, being described as "No. 19 D." This piece was located June 16, 1883, on unsurveyed lands in the Duluth district by one Eaton, who held a power of attorney executed and delivered by the recipient of the scrip and her husband,—she having married a man named Stram in the meantime,—which power authorized Eaton to locate the scrip, and to do all acts necessary to secure a permanent and bona fide location thereof. After the land was surveyed, and on July 21, 1885, the location was adjusted at the local office to governmental subdivisions on the application of the attorney in fact. In a contest instituted by one Hyde, who

<sup>1</sup>MIDWAY COMPANY v. FRANK W. EATON and Others.

May 16, 1900.

Nos. 12,016—213.

**PER CURIAM.**

All questions involved in this case are disposed of in the opinion filed in Midway Company v. Eaton.

Judgment affirmed.

claimed the land under the pre-emption act, the commissioner of the general land office held the Stram entry unauthorized and invalid, and that the same should be cancelled and set aside. This decision was affirmed by the secretary of the interior February 18, 1889. Hyde's claim was disposed of adversely to him at the same time. The land was subsequently patented by the United States to one Hicks, under the homestead act, and Hicks' successors in interest brought this action to determine adverse claims against defendants, who assert ownership under the Stram entry. On findings of fact the court below held, as conclusions of law, that the plaintiff held the legal title to the land in trust for defendants, in certain undivided shares, and that said defendants were and are the owners thereof, and ordered judgment accordingly.

1. *Held*, that the secretary of the interior acted without the authority of law when he decided the Stram entry or location to be unauthorized and invalid, and for that reason affirmed the order of the commissioner cancelling the same.

2. *Held*, further, that the scribee, or her successors in interest, could not be deprived of their rights in the land by the assumption of a supervisory power by the officials in the land department, or by the issuance of a patent to another.

3. *Held*, that the findings were supported by the evidence, and justified the conclusions of law.

Action in the district court for St. Louis county to determine adverse claims to land. The case was tried before Moer, J., who found in favor of defendants. From an order denying a motion for a new trial, and also from a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

*Walter Ayers and P. H. Seymour*, for appellant.

Counsel cited the act of congress of July 17, 1854 (10 St. 304), giving the reasons for its passage with particular reference to the clause against the assignability of the scrip issued thereunder. For the construction placed upon the act by the land department of the United States: *Hyde v. Eaton*, 12 L. D. (Dep. Int.) 157; *Allen v. Merrill*, 8 L. D. 207; *Allen v. Merrill*, 12 L. D. 138; *Felix v. Carroll* (unreported), decided March 27, 1863; *Murphy v. Jones* (unreported), decided June 29, 1876; *McGregor v. Quinn*, 18 L. D. 368; *Strong v. Pettijohn*, 21 L. D. 111; *Morgan v. Missoula*, 21 L. D. 306; *John W. Poe*, 29 L. D. 309; 1 *Lester*, Land L. 628; 2 *Lester*, Land L. 369.

For the construction placed upon the act by the courts: *U. S. v. Chapman*, 5 Saw. 528; *Rose v. Nevada*, 73 Cal. 385; *Monette v. Cratt*, 7 Minn. 176 (234); *Gilbert v. Thompson*, 14 Minn. 414 (544); *Coursolle v. Weyerhauser*, 69 Minn. 328; *Dole v. Wilson*, 20 Minn. 308 (356). For the construction placed upon the act by the United States supreme court: *Felix v. Patrick*, 145 U. S. 317; *Fee v. Brown*, 162 U. S. 602; *Carter v. Ruddy*, 166 U. S. 493.

As to the relation of the federal government to the Indian and its policy of protecting the Indian from the results of his own improvidence: *Cherokee Nation v. State of Georgia*, 5 Pet. 1; *Jones v. Meehan*, 175 U. S. 1; *Smith v. Stevens*, 10 Wall. 321. As to the policy of the government with reference to unsurveyed lands: *Lytle v. State*, 9 How. 314; *Buxton v. Traver*, 130 U. S. 232; *Ather-ton v. Fowler*, 96 U. S. 513; *Johnson v. Towsley*, 13 Wall. 72; *Webster v. Luther*, 163 U. S. 331. As to restraints on alienation imposed by the pre-emption and homestead laws: *Anderson v. Carkins*, 135 U. S. 483; *Myers v. Croft*, 13 Wall. 291; *Quinby v. Conlan*, 104 U. S. 420. As to the duty of the land department to enforce the policy of the government relating to the disposal of public land and the supervisory power of the secretary of the interior: *Knight v. U. S. Land Assn.*, 142 U. S. 161; *Orchard v. Alexander*, 157 U. S. 372; *Michigan L. & L. Co. v. Rust*, 168 U. S. 589; *American Mort. Co. v. Hopper*, 29 U. S. App. 12.

*J. L. Washburn, W. D. Bailey, and Towne & Harris*, for respondents.

COLLINS, J.<sup>2</sup>

Action to determine an adverse claim to three governmental subdivisions situated in St. Louis county. The court below found against plaintiff, the corporation, and ordered judgment in favor of the defendants, as owners of undivided interests. The appeal is from an order denying a new trial, and also from the judgment thereafter entered.

This case is another chapter of the controversy which has been in progress since 1883, in the courts and in the interior department of the general government, over that well-known and very at-

<sup>2</sup> LEWIS, J., did not sit.

tractive section 30. The particular tracts here involved were referred to in the case of Bishop Iron Co. v. Hyde, 66 Minn. 24, 68 N. W. 95, recently affirmed in the supreme court of the United States,<sup>2</sup> as those upon which had been located, prior to the initiation of Hyde's claim, Sioux half-breed scrip No. 19 D, issued to a woman named Moreau, which location was contested by Hyde as therein set forth,—a contest which resulted disastrously to both parties; the secretary of the interior finally sustaining the decision of the commissioner of the general land office that the scrip location should be cancelled for noncompliance with the law, and that Hyde had no rights as a pre-emptor, because he had previously contracted to sell and convey to a third party a portion of the land he proposed to acquire.

In 1898 the land in question, a part only of that covered by the Moreau scrip, was patented by the United States under the homestead act to one Hicks, and the plaintiff's claim of title is derived from him. The defendants assert ownership through and under the scrip location; their position being that the same was unlawfully canceled by the officials of the land department, that the scribee could not be deprived of rights obtained under the location or entry, that the patent subsequently issued to Hicks inured to the scribee's benefit, and that the former and the plaintiff, who purchased with notice, held the land in trust for defendants. It is this trust which the court below enforced through the judgment appealed from.

As we regard the case, the rights of the respective parties rest upon the legality of the rulings in the land department; the last being the affirmance by the then secretary of the interior of the order of cancellation, as made by the commissioner of the general land office August 4, 1888. This affirmance bore date February 18, 1889, and is unpublished. It was sustained by the successor in office of said secretary. See Hyde v. Eaton, 12 L. D. (Dep. Int.) 157. In the Hyde case much of the history of this contest in the department is related. The testimony was taken before the local land officers, who were of the opinion that the scrip entries were valid.

<sup>2</sup> 177 U. S. 281.



Certified copies of the testimony of the witnesses produced at this hearing were received in evidence in the court below. The written opinion of the local officers, and the findings made by them, if any, were not there presented. Nor were there introduced the findings of fact and conclusions of the commissioner as they appeared, undoubtedly, in his decision of August 4, 1888. But parts or all of these findings were recited in the decision of affirmance made by the secretary, of date February 18, 1889; a certified copy of the same having been received in evidence at the trial.

From this copy and other testimony it appears that on June 16, 1883, one Eaton, as attorney in fact for the half-breed, who had in the meantime married a man named Stram, and who will hereinafter be called Mrs. Stram, filed the scrip in question, with other pieces, upon tracts of unsurveyed land in the Duluth district. The necessary affidavits, with the powers of attorney, and diagrams to locate and identify the tracts, were also filed. All of the steps required by the rules and regulations of the land department seem to have been taken in due form. July 21, 1885, upon the application of the attorney in fact, scrip No. 19 D was adjusted by the local officers to the governmental subdivisions herein involved, and other subdivisions; the land having been surveyed by the authorities just previously. The Hyde contest was commenced the day before.

We now come to facts which, from the decision of the secretary, it appears were found by the commissioner in his decision affirmed by the secretary, as before stated:

(1) It was found that accompanying the scrip, and application to locate the same, was what purported to be the original power of attorney given May 25, 1883, by the scribee and her husband to Frank W. Eaton; that with the application was an affidavit by said Eaton setting out that he, under said power of attorney, had caused to be built upon the tracts upon which the scrip was located a house fourteen by sixteen feet, one story high, of timber, covered with split shingles, with doors and windows; that he also had cleared one-half acre of land. And also setting forth:

(2) That said improvements were made under the personal direction of the scribee, and for her personal use and benefit.

(3) It was found by a clear preponderance of evidence that said Eaton, by virtue of his power of attorney, employed Edward Byrne to make the improvements upon the tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter.

(4) That Eaton admits that the power of attorney under which he acted was executed by the scribee in blank; that he never saw the scribee until March 31, 1886, never saw the land, and did not know whether said scribee ever saw it or not; that the deed of confirmation by the scribee appears, so far as she and Eaton are concerned, to remove any objection to the acts previously performed by the latter under and by virtue of his said power of attorney.

(5) That in the record is what purports to be an original power of attorney given by the scribee and her husband to Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pieces or parcels of land in the state of Minnesota which they then owned, or might thereafter acquire or become interested in, by virtue of the location of the scrip in question; to prosecute and defend any suit at law in the courts of said state; and to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, by deed, conveyance, demise, or lease, in the same manner as if performed by them individually.

(6) That on March 31, 1886, the scribee and her husband joined in a deed of confirmation ratifying and confirming, all and singular, the acts of Frank W. Eaton and Leonidas Merritt relative to the tracts in question, done and performed by them under the respective powers of attorney given as hereinbefore described.

The decision contains further recitals of findings, which appear to us to be of no value when passing upon the main question before us, and we shall have no occasion again to refer to them, except incidentally. The decision proceeds, after stating facts, as follows (the italics being our own):

"This would seem, on its face, to point to an adjudication in favor of the scrip locations; but your office decision further proceeds to say that the only other question left to pass upon, touching the legality of these locations, is whether the power of attorney given by the scribee to Frank W. Eaton, by virtue of which he made the location, *could carry with it, under the law, the power and authority to*

*make the improvements* which were necessary as a prerequisite to valid location of the scrip on unsurveyed land. On this question your office decision concludes that since the evidence shows clearly that the scribee in this case never saw the land or the improvements, or had anything whatever to do therewith, and since the *circular referred to, supra, requires that the Indian shall have a direct connection with the land, and claim the same for his or her personal use*, the scrip locations are not valid, and should be cancelled, as speculative and made with an evident intent to evade the law, rather than to comply in good faith with legal requirements."

The circular referred to was one issued in 1864 by the land department to the local officers, in which the latter were advised that scrip could be located:

"(4) Upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements.

\* \* \*

(5) When not located by the reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee. The land selected in satisfaction of a certificate of scrip must, of course, be located in the name of the party in whose favor the scrip is issued; and the location may be made by him or her in person, or by his or her guardian or duly-authorized agent."

The secretary then proceeds to consider the facts, "epitomized," as he claims, making several statements which are not founded upon any evidence now before us; and then he characterizes the improvements as "scarcely deserving the name." In all essential particulars, said the secretary, the case is like that of *Allen v. Merrill* (decided by him on the same day) 8 L. D. 207, review denied in 12 L. D. 138; and, following the rule in that case, the secretary held the location invalid. If, on the facts as found, the secretary correctly interpreted and applied the law which governs in such cases, his decision must be upheld. But, if there was error in the construction of the statute, the decision is of no binding force in this litigation.

Before considering the law under which the scrip was located, let us briefly refer to the facts found by the commissioner of the general land office, according to the secretary's decision. The contents of the affidavits as to the extent of the improvements made

by Eaton are recited, and inferentially, at least, are found to be true. These improvements consisted of a log house fourteen by sixteen feet in size, one story high, covered with split shingles, with a door and a place for a window. Half an acre was cleared. This was done in June, under the direction of Eaton, who held a power of attorney executed by Mrs. Stram and her husband, less than a month before, to locate this scrip, and "to do all acts necessary to perfect and secure a permanent and bona fide location" thereof. We are clearly of the opinion that, from the secretary's decision, it appears that the commissioner found these improvements to have been made prior to the location. And it also appears that the commissioner found that they were made by persons employed by Eaton for the purpose, and by virtue of his power of attorney; the question being, as stated by the secretary, whether the power to locate carried with it, under the law, the authority to make the improvements required to be made upon the location of scrip on unsurveyed lands. As the scribee never saw the land or the improvements, had no direct connection with the land, and never claimed the same for her own personal use, it was held that the location was invalid, and the cancellation seems to have followed as a consequence.

The law under which scrip was issued to the half-breeds or the mixed bloods of the Sioux Nation was the act of congress of July 17, 1854 (10 St. 304). The act is not complicated. In some respects it is quite indefinite, but it empowered and authorized the president to cause to be issued to certain mixed bloods certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin reservation among them pro rata. There was a provision that these certificates or scrip might be located upon the lands within the reservation, or upon other unoccupied lands subject to pre-emption or to private sale; that is, lands which had been surveyed, and also upon unsurveyed lands not reserved by the government, "upon which the applicants have respectively made improvements." There was a provision that these certificates or scrip should not embrace more than 640 nor less than 40 acres each, and they were to be equally apportioned among those entitled.

To ascertain who was entitled, reference must be had to the ninth article of the treaty of Prairie du Chien, of date July 15, 1830 (7 St. 331), from which it will appear that in a very general manner the reserved or Pepin tract was bestowed upon the half-breeds of the Sioux Nation; they to hold as all other Indian titles were held. Thereafter, and as empowered by the 1854 act, the president caused certificates or scrip to be issued to these mixed bloods indiscriminately, and without reference to age, sex, or other conditions. The result was that old and young, adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly prevailed, were the recipients. And this fact is not to be ignored when discussing the correctness of the secretary's views as found in his decision of February 18, 1889. Under the law there were issued to each one of 640 persons (Mrs. Stram being one of the 640) five pieces of scrip, thus described: 1 A, 40 acres; 1 B, 40 acres; 1 C, 80 acres; 1 D, 160 acres; 1 E, 160 acres,—a total of 480 acres each. To each one of 38 persons there was issued one piece for 40 acres, and two for 160 acres,—in all, 360 acres to each. And this is another fact to be kept in mind. There was also another proviso in the act of July 17, 1854,—“that no transfer or conveyance of any of said certificates or scrip shall be valid.” It is clear that this is a positive and emphatic prohibition on the assignability of the certificate or scrip, but it is not a prohibition upon a conveyance of the land upon which scrip had been located. As was said in *Gilbert v. Thompson*, 14 Minn. 414 (544):

“No restraint is imposed upon the right of property in the land, after it is acquired by location of the scrip. In the scrip itself, the half-breed had nothing which he could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, because the scrip is not transferable.”

Further considering the law, it is well to look at the construction placed upon it by the officers of the interior department soon after scrip was issued to the beneficiaries,—a construction contemporaneous with the passage of the law. We find that immediately after its issuance a circular was promulgated by the commissioner of the general land office for the information and guidance of the local officers, a clause of which read that locations might be made

“Upon any unsurveyed lands, not reserved by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix with certainty the exact locality wanted, serve as the best notice in our power to settlers, that conflict may be avoided, and enable you, when the public surveys are made, to designate the legal subdivisions embracing the location.”  
1 Lester, L. L. 628.

We have discovered that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character, or that they should be made by the scribee or under his personal direction, but that the application should be accompanied by a diagram and description, that the exact locality might be designated, and thus, in connection with the improvements upon the ground, conflicts might be avoided between claimants, and the locations more easily and certainly adjusted when surveys were actually made. The making of improvements by or under the scribee's immediate direction was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the seventeen years which followed, prior to the issuance of another circular, in the year 1864, emanating from the same office and for a like purpose; and from this we have hereinbefore quoted. In this circular it was stated that where a half-breed, for himself, may make actual settlement, his improvements will be notice on the ground to any other settler.

And we are of the opinion that the purpose of this feature of the law, requiring improvements to be made where the scrip was lo-

cated on unsurveyed lands, must have been that visible notice, by work done on the ground, might thereby be given to other persons of the scribee's prior right, and thus prevent collision and conflict. The language as to improvements was general and vague. None were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose. Obviously, it was not the design of the law to compel actual settlement or residence upon the land; for, had it been, the language would have been plain and unambiguous. This purpose was accomplished wherever the improvements were of such a character as to be notice, and their value or extent was of little consequence. That in this case they were ample, as notice, ought not to be questioned. The entire purpose of the act itself seems to have been to promote and secure an exchange of the interests of the mixed bloods in the reservation, which was becoming valuable for actual settlers, for certificates or scrip which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain. It was proposed to compensate the mixed bloods, who surrendered their rights or claims under the treaty, in a manner which would be of some value, and it has been held that the fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary from making an agreement before location, or giving power to convey the land when the scrip shall have been located and the land entered.

We need not cite decisions in support of this proposition for they are abundant,—federal and state. Nor need we stop to consider why congress saw fit to declare that the scrip should not be assignable, and yet failed to deprive the scribee of the power of alienation immediately after the location, and in pursuance of a bargain previously made. It is enough to know that the prohibition related solely to assignments of the scrip itself. So that, as before stated, the question is, was the land validly appropriated by the location of the scrip in the name of Orillie Stram, to whom it had been issued, with four other pieces; and the only invalidity found by the commissioner of the general land office and the secretary was that Mrs. Stram had not seen the land or improvements, and did not have direct connection with either, and never claimed the same for

her personal use. The rules and regulations of the land department had not been complied with, it was stated, and it was held that this was sufficient to justify the cancellation.

Under the decisions of the land department, as well as those of the courts, a scribee can empower another to do all things necessary as a condition precedent to a location, and then to actually locate. The improvements were made under the direction of a duly-authorized agent, and then the entry was made in the name of the scribee by the same agent or attorney in fact. Mrs. Stram did not complain of this entry, and urge that her rights had been disregarded. Upon the other hand, she ratified and confirmed every act performed by her attorney in fact, by a properly executed deed, executed in March, 1886. Now, when we examine some of the provisions of the law, we are led to ask, could it have been the intention that each person to whom certificates or scrip was issued should see the land, in person, upon which each piece was to be located, or should, in person, see the improvements, or claim the same for personal use, or be directly (that is, personally) connected with either or both? Under this law the president was authorized to do what was actually done,—issue to each person entitled several pieces of scrip, of different sizes or acreage. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made, if all of the pieces were located on unsurveyed lands, and would have to claim the same for personal use? Surely not. This law contemplated and there were actually issued several pieces of scrip to each of a large number of minors. Babies in arms were held to be entitled, and to them scrip was issued, and in many cases located before the minors reached majority, as might reasonably be expected.

With these facts before us, can it be urged that congress thought or intended that these minors would be required, by a construction of the law, personally to supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or, in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other



words, do not these facts indicate, to a moral certainty, that it never occurred to the members of congress that the construction placed on this law by the secretary would be given to it at any time,—much less, after thirty years of a wholly different construction? And a construction, also, which received judicial recognition and approval. See *Gilbert v. Thompson*, *supra*; *Hope v. Stone*, 10 Minn. 114 (141); *Marks v. Dickson*, 20 How. 501. We are confident that they do so indicate, and that the requirements found in the circular of May 28, 1878, were not in accordance with the law, and were therefore unauthorized. The act itself never required that the improvements should be of a certain kind or value, or that the scrip should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative branch of the general government intended to confer upon the mixed bloods, in exchange for their interest in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with the locations and improvements, and made claim to both for their own use and benefit.

It is urged that Eaton's entry amounted to an evasion of that part of the law which forbade an assignment of the scrip; the well-known rule being invoked, that an act which cannot be done directly cannot be accomplished indirectly. But if an agent can be authorized by the scribee to do all acts that may be necessary as a condition precedent to a location, and may also be authorized to carry the scrip to the land office and complete the entry (and this, it is well settled, may be done), why is not the prohibition evaded quite as completely as the secretary claimed it was in this case? The evasion is in every case where a contract of sale is made or contemplated, if it is in one. Locations under such circumstances have been repeatedly, almost universally, upheld; the officials of the department declaring, however, that the scribee cannot assign the scrip, that the location must be in the name of the person to whom the same was issued, and that the patent must be so issued, but further holding that, as the power to alienate is unrestricted by the law, an agreement to sell is not a matter for determination

in the land department. It seems very apparent that the effect and validity of such an agreement must be left to the arbitrament of the courts, and not to the decisions of the government officials.

We have not discussed the point made by counsel, that as the method adopted by Mr. Eaton was in accord with the long-continued practice of the department, as set out in its circular of 1857, the action of the commissioner and the secretary should be set aside as unwarranted. We think it unnecessary. Nor do we consider at length the further point that the location of July 21, 1885, after the lands had been surveyed and the plats returned, was a valid location, even if the earlier one was invalid for the reasons assigned by the officials. It is true that the Hyde claim was the only one intervening when this scrip was adjusted or again located, and that claim was corrupt and invalid, as has been finally determined. So when the application of July 21 was made there was no valid, existing adverse right which had attached, and which stood in the way of a location of the scrip as upon surveyed lands, no improvements being necessary. There was no forfeiture of the scrip by the previous attempt to locate. If invalid, it was nothing but an attempt. No moral turpitude or breach of any legal duty was involved in the first location. If Mr. Eaton, as the agent, had there expressed a desire to withdraw and relinquish all rights acquired previously, and to lay that particular piece of scrip on the land in question, as of that day, would not his right so to do seem unquestionable? And would not the obligation of the local officers to permit this act to be done appear to be beyond doubt? If this be true, why was not the legal effect of the adjustment a location of the scrip upon surveyed lands, there being no valid claim or right intervening and in conflict? The application then made was sufficient in form for an original location. If the scribee, Mrs. Stram, either in person or by agent, could that day have successfully applied for this land, had she never made any previous attempt to obtain it, why should the application be rejected? Surely not on the ground that she had tried before, and failed while the land was unsurveyed.

Our conclusion is that upon the facts as found, hereinbefore stated, the commissioner of the general land office and the secre-

tary of the interior erroneously construed the law, and imposed unwarranted conditions. The decision of the latter appears to have been predicated upon a circular of instructions, not upon a statute. It was error to hold that under the act in question it was vital that the scribee should see the land or the improvements prior to the entry, and that an agent could not act in her behalf, when duly authorized, not only in selecting the land itself, but in making such improvements as would in themselves, and without regard to their value, be notice on the ground of the assertion of a prior right. It was error to hold that the scribee had nothing to do with these improvements, for she had empowered an attorney in fact to make them. It was error to hold that the scribee must have direct connection with the land. And if, by his decision that the scribee must claim the land for her own personal use, the secretary meant that such claim must be formally made, or made in good faith, or must be established by proof other than or different from that before the land department in this particular case, he was in error.

There was not even an intimation in the law that the scribee should personally inspect or select the land, or should make in person, or even examine, the improvements. Scrip was issued in from three to five separate and distinct pieces, and of different acreage. It was issued to persons who were old and decrepit,—physically and permanently incapable of complying with the requirements established by the secretary. Was the fact that they were old and disabled to be used to their injury, and were they to have nothing but unavailable pieces of paper? Certificates of scrip were issued to infants who would not reach a suitable age for obeying the behests of the land officials for a score of years. Were they expected to act through guardians or other agents, and have some benefit of the provisions of the law, or were they expected to wait until majority came to them, and then to comply with the circular requirements? No distinction or discrimination was made in the law between the adult and the minor, and the department could impose none by requiring less of the minor making a location than of the adult. Nor did the law require that the land on which the scrip was located must be selected by the mixed bloods for personal use, or even that a claim of this kind should be made. In fact, as we

have seen, the inference to be drawn from its language, and from what was done at and about the time, is to the contrary. And the secretary erred in holding, upon the facts as found, that the scribee had no interest whatever in the location made by her attorney in fact. Such a holding is, in effect, deciding that every piece of scrip issued to the mixed bloods which cannot be used by the recipient for his or her own personal benefit, and for the acquirement of land for his or her own personal use, could not be used at all, and was of no value.

Finally, we hold that on the facts and the law the location in behalf of Mrs. Stram was proper and valid. It was error on the part of the officials of the land department to cancel the location and entry. Mrs. Stram or her successors in interest could not be deprived of her rights in the land by the assumption of a supervisory power by these officials, or by the issuance, under their direction, of a patent to another person. The act of July 17, 1854, did not provide for the issuance of a patent, and the title to the property passed to Orillie Stram, née Moreau, by virtue of the location.

The findings of fact justified the conclusions of law in the court below, and the judgment is affirmed.

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GILBERT BRANDSER v. OLE O. MJAGETO.

May 16, 1900.

Nos. 12,013—(109).

**Decision Sustained by Findings.**

The conclusion of law in this case, as made by the trial court, is supported by findings of fact which have not been assailed as not sustained by the evidence.

Action in the district court for Becker county to establish plaintiff's title to a building. The case was tried before Baxter, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

*True & Farmer*, for appellant.

*H. Steenerson*, for respondent.

**COLLINS, J.**

This is a somewhat singular action,—brought, as stated by the plaintiff's counsel, "for the establishing of title to, and for possession of, a certain house, stable, and granary," which defendant refused to surrender upon plaintiff's demand. The case was tried before the court without a jury, and, upon its findings of fact, judgment was ordered for the defendant.

The buildings in dispute were erected by one Jellum some time prior to 1883, on what he supposed to be his homestead,—a tract of 160 acres,—to which he afterwards obtained title under the homestead laws of the United States. As a matter of fact, the buildings were erected over the line, and on a tract of land which then and now belongs to the state of Minnesota. Jellum lost the tract of land on which he supposed the buildings were located, by foreclosure of a mortgage, and the defendant subsequently purchased the same from the mortgagee, who had bought it in at the foreclosure sale. Defendant went into the possession of the land and the buildings, and thereafter, by an agreement made with his vendor, reconveyed the land in full satisfaction of a mortgage note which he had given at the time he purchased. Thereafter he remained in possession of the land as a tenant for one year. He has occupied the buildings in question continually since March 1, 1893, at which time he purchased the land, as before stated.

The court below found as facts, among other things, that all persons and parties who had been connected with the land in any manner from the time the buildings were erected until the time defendant reconveyed to his vendor understood and believed that these buildings were on the mortgaged land, and that each of said persons dealt with said land and with each other in that understanding and belief. The court also found that plaintiff purchased this land with knowledge at the time that said buildings were not situated upon it, but were in fact situated on land belonging to the state of Minnesota. The correctness of these findings is not challenged by the defendant's counsel, and must be treated by us

as absolutely true. From them it appears that the plaintiff bought the land alone; that he knew that the buildings were not upon the tract he purchased, and also knew that they were on land belonging to the state. There was no finding that his vendor sold or assumed to sell the buildings, or that plaintiff bought, or even supposed he was buying, the same. Counsel for plaintiff assume that plaintiff stands in the shoes of his client's vendor,—an unwarranted assumption, in so far as is shown by the findings. On the case as presented to us, the plaintiff acquired no rights as against the occupant of the buildings, and can maintain no action to establish his title thereto or to obtain possession. It would seem that these structures are the property of the state.

“Prima facie, all buildings belong to the owner of the land on which they stand as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property. If erected wrongfully, or without such agreement, they become the property of the owner of the soil.” *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 218, 56 N. W. 821.

Order affirmed.

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GEORGE W. OLIN v. JOHN N. FOX and Another.

May 16, 1900.

Nos. 12,049—(72).

**Property Exempt from Execution—Food for Stock.**

The statute (G. S. 1894, § 5459) exempts from attachment or sale on final process (subdivision 6) the necessary food for all of the stock or animals previously declared to be exempt. In order to have the benefit of the exemption of food therefor, it is not required that the debtor shall own all of the stock or animals mentioned in the section, and for which the food exemption is claimed.

Action in the district court for Wilkin county to recover \$50.50, and interest, damages for the wrongful seizure under attachment of 112 bushels of oats and 75 bushels of barley. The case was tried before Watts, J., and a jury, which rendered a verdict in favor of

plaintiff for \$56. From an order granting defendant's motion for a new trial unless plaintiff consent to a reduction of the verdict to \$29, plaintiff appealed. Reversed.

*Charles S. Marden*, for appellant.

*Henry G. Wyvell*, for respondents.

**COLLINS, J.**

This case involves a construction of G. S. 1894, § 5459, which (subdivision 6) exempts from attachment or sale on any final process:

"Three cows, ten swine, one yoke of oxen and a horse, or, in lieu of one yoke of oxen and a horse, a span of horses or mules, twenty sheep, and the wool from the same, \* \* \* the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose," and several other articles.

The question is, is the necessary food for all these animals or stock exempt for the period mentioned, or is the exemption confined to such of the stock as the debtor may own at the time the attachment or execution is levied? It seems to a majority of the court that but one construction can be placed upon this section. See *Kimball v. Woodruff*, 55 Vt. 229. Certain animals are declared to be exempt, and the necessary food for all mentioned is also declared to be exempt. We are unable to read into this statute a further provision that, in order to have the benefit of the exemption, the debtor must own the animals. There is nothing ambiguous about the language used. The exemption laws are not to be construed in a narrow or illiberal manner, and the construction claimed for this subdivision by the defendants' counsel would work positive injury and wrong in many cases. For illustration, let us suppose that the debtor owns a pair of horses, and has the necessary food for them for one year. He loses one by death, and before purchasing another the seizure is made. Under such circumstances, the debtor would be deprived of the benefit of the exemption, if counsel is right. It is true that our construction leads to an exemption of food for stock in the hands of a person who has none of the animals mentioned, and no intention of obtaining them, but the remedy to be applied is with the legislature. The court

below erred when it held that, to have the benefit of this statute, the debtor must own the stock for which exemption of food is claimed.

The order appealed from is reversed, with directions to enter judgment in favor of the plaintiff upon the verdict.

LEWIS, J. (dissenting).

It is true that exemption laws should be construed liberally, so as to carry out the legislative intent. Such statutes are founded upon the benevolent purpose of guarding debtors from want, who have suffered from misfortune or improvidence. And if a strict and literal reading of such a statute leads to a conclusion out of harmony with its spirit, sufficient latitude should be granted to still preserve its purpose. The exemption laws of this state in reference to personal property (G. S. 1894, § 5459) are based upon a logical system. First, there is a class of exemptions, found in the first five subdivisions, common to all debtors,—the family Bible, books, musical instruments, church pew, burial lot, family wearing apparel, and household goods, and, by the amendment of 1868, the sewing machine. Then the statute deals with debtors with reference to their business or employment, the tools and implements of a mechanic, the library of a professional man, the outfit of the printer or publisher, the wages of the laborer, and the stock enumerated in the sixth subdivision, and the necessary food for the same for one year's support.

While this section applies to all debtors possessing the stock, yet the legislature must have contemplated that the owners of the stock thus exempted were to some extent dependent upon it as their means of living. The object in exempting the food is to give full force and effect to the exemption of the stock. It would be a serious matter to leave the owner with his stock, but no food for them. Hence the exemption of the stock is made effective by providing the food. There is no object in exempting the food if there be no stock to consume it. If it had been the intention of the legislature to exempt the food without reference to the stock, how simple a matter to state it so. The statute exempts one yoke of oxen and a horse, or, in lieu of one yoke of oxen and a horse, a span of



horses or mules. Which will require the most food for a year,—the oxen and the horse, the span of horses, or the span of mules? And who is to determine this,—the owner, or the officer making the levy? I think the natural and logical construction of this provision is that given it by the court below. A similar statute was so interpreted in *King v. Moore*, 10 Mich. 538; also, in *Foss v. Stewart*, 14 Me. 312.

In the case of *Cowan v. Main*, 24 Wis. 569, the court refer to *King v. Moore*, *supra*, approve of and apply it to the case under consideration, and then add an observation that it should be qualified when it appeared from the debtor's own showing that, though he had not at the time being the full number of animals, yet he had the present, bona fide intention and purpose of at once acquiring them, so as to need the food for their support. If such construction were adopted, it would be more than liberal, and still consistent with the spirit of the act. The case cited in the opinion is based upon a statute differently worded. Under the law as now determined by the majority, any debtor, be he lawyer or merchant, may hold the stated amount of food against his creditors, even if he never owned and never expected to own any stock whatever, which privilege, it appears to me, was never contemplated by the lawmakers. I think the construction suggested in *Cowan v. Main*, *supra*, should be adopted, and a new trial ordered.

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MARY E. HIGGINS v. THOMAS WREN.

May 16, 1900.

Nos. 12,174—(86).

**Charge to Jury—Reputation of Witness for Veracity.**

The testimony of a witness whose reputation for truth and veracity in the neighborhood in which he resides is shown to be bad is not necessarily destroyed, but should be considered, and given such weight as, under all of the circumstances, the jury believe it entitled to. It should be disregarded if the jury believe it entitled to no weight.

**Same—Error.**

The instruction given on this point by the court below *held* to be erroneous.

Action in the district court for Wright county to recover \$200, and interest, damages for the conversion of a note and mortgage. Lizzie Stowell intervened. The case was tried before Giddings, J., and a jury, which rendered a verdict in favor of plaintiff and against defendant and the intervenor for \$263. From an order denying a motion for a new trial, the intervenor appealed. Reversed.

*James C. Tarbox*, for appellant.

*Alley & Culkin* and *J. J. Woolley*, for respondent.

**COLLINS, J.**

On the trial of this cause there was testimony received tending to impeach one of the defendants who had testified as a witness, as unworthy of credit, on the ground of general bad reputation for truth and veracity in the neighborhood wherein he resided. The court subsequently charged the jury as follows:

"If the jury believe from the evidence in this case that the reputation of any witness in this case for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard his whole testimony, and treat it as untrue." At this point defendant's counsel called special attention to the words "treat it as untrue," and thereupon the court resumed thus: "That is, you have a right to treat his testimony as untrue; that is, you have the right—the law does not require that you must, but that you have the right—to treat it as untrue, except where it is corroborated by other creditable evidence, or by facts and circumstances proved on the trial."

To this part of the charge counsel reserved an exception. We are of the opinion that this statement of the law was altogether too broad. This instruction authorized the jury to wholly disregard and reject all of the testimony given by the witness if satisfied that his general reputation for truth and veracity was bad in the neighborhood in which he resided, no matter how truthful all or a part of such testimony might in itself, and standing alone, appear to be. It is true that this language was taken bodily from a well-known work on instructions to juries, but the author cites no authority in

support of it. Nor do we find any. We are of opinion that the instruction upon this point approved in *State v. Miller*, 53 Iowa, 209, 4 N. W. 1083, is one which will be better understood and much better serve the purpose, as follows:

"Where it is shown that the reputation for truth of a witness is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight."

The successful impeachment of a witness merely affects his credibility.

Order reversed.

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C. E. FORD v. HANS BERG.

May 22, 1900.

Nos. 12,005—(178).

**Violation of Court Rule—Costs Denied.**

Appeal by defendant from a judgment entered in the district court for Polk county, pursuant to an order of Watts, J. Affirmed.

*J. Walseth*, for appellant.

*L. E. Gossman*, for respondent.

**PER CURIAM.**

This action was brought in a justice court to recover the sum of \$7.60 for goods, wares, and merchandise alleged to have been sold and delivered to defendant by plaintiff. Defendant appeared in the justice court and filed an answer in which he impliedly admits the sale and delivery of the goods, and alleges as a defense that at the time of such sale he was at work as a farm hand for one Redland, and that the sale was made under an agreement with plaintiff whereby plaintiff agreed to hold said Redland for payment; that Redland deducted the amount thereof from defendant's wages and is alone liable to plaintiff. The justice tried the case, found adversely to defendant on this defense, and rendered judgment in plaintiff's favor for the sum of \$5.60. Defendant appealed

to the district court, on questions of law alone, where the judgment was affirmed, and he again appeals to this court.

The judgment is affirmed. There are no questions of law, important or otherwise, of a nature to justify the appeal to this court.

The cause was set down for oral argument in this court in violation of the rules, and no statutory costs will be allowed.

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REALTY REVENUE GUARANTY COMPANY v. FARM, STOCK, AND HOME PUBLISHING COMPANY.

May 22, 1900.

79	465
82	190

Nos. 12,042—(77).

**Pleading—Attaching Exhibits.**

Exhibits may be attached to and made part of a pleading, not as substantive allegations of the contents thereof, but to aid, and in explanation of, the facts formally alleged and set forth in the body of the pleading.

**Complaint—Repeating Allegations—Several Causes of Action.**

Where a complaint contains several causes of action, allegations and matters of fact set forth in the first cause, which apply alike to all others, may be made a part of each subsequent cause of action, without repeating the same at length, by an appropriate allegation of reference thereto.

Appeal by defendant from an order of the district court for Hennepin county, Brooks, J., overruling a demurrer to the complaint. Affirmed.

*S. R. Child*, for appellant.

*Alfred L. Brice* and *M. A. Spooner*, for respondent.

BROWN, J.

Action for libel. The complaint alleges, in paragraphs designated therein as first and second, that the plaintiff is a corporation duly organized and existing under the laws of this state, and that defendant is also a corporation. In paragraph third it is alleged

“That heretofore and ever since the 1st day of March, 1899, plaintiff

was engaged in the business of buying and dealing in personal property and real and mixed estates, and, incident thereto, was making a large number of sale contracts with the farmers in the northwestern states, a copy of which contract is hereto attached and made a part hereof; that heretofore, and on the 13th day of April, 1899, defendant was engaged in publishing a certain bimonthly newspaper, called the 'Farm, Stock, and Home,' which has a large circulation among the farmers in the states heretofore mentioned, and which is printed and published in the city of Minneapolis."

The complaint contains four causes of action. Different excerpts from the libellous articles charged to have been published by defendant are taken and made the basis of separate causes of action. The allegations of the complaint as to the second cause of action contain the following:

"For a second cause of action, plaintiff \* \* \* realleges and reaffirms all the allegations of paragraphs 1, 2, and 3 of plaintiff's first cause of action."

The third and fourth causes of action contain the same allegations. Defendant interposed a general demurrer to each cause of action, the ground of the demurrer being that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant appealed.

Defendant's counsel makes four distinct objections to the complaint: (1) That the exhibits attached thereto can in no sense be treated as a part of the complaint; (2) that, if such exhibits are construed to be a part thereof, they can only help out the first cause of action; (3) that the third cause of action is not a libel against the corporation, but against its officers; and (4) that the publication is privileged. None of these objections is well taken.

1. The first is that the exhibits attached to the complaint cannot be considered as any part thereof. The exhibits are (1) the libellous article taken from defendant's publication; and (2) a form of contract which plaintiff alleges it was making with farmers. It is very well settled that exhibits may be attached to and made part of pleadings, not as substantive allegations of fact, but in aid and explanation of the fact formally alleged in the body of the pleading. *Elliot v. Roche*, 64 Minn. 482, 67 N. W. 539; 8 Am. & Eng. Enc. Pl.

& Pr. 740, and notes. Whatever may be the practice in other states in this respect, it is recognized in this state as proper to attach copies of papers and exhibits, rather than to set them out in *hæc verba* in the body of the pleading; and when so attached they may be referred to in aid of, and in construing and applying, the facts alleged.

2. The second point is equally untenable. Counsel contends that, if such exhibits are properly a part of the complaint, they can only be considered and referred to with reference to the first cause of action, because they are not specially referred to and made a part of the subsequent causes of action. In other words, his contention is that "the statement in each cause of action, after the first, that 'plaintiff realleges and reaffirms all the allegations of paragraphs 1, 2, and 3 of plaintiff's cause of action,' does not have the same effect as repeating those allegations." Brevity in pleading is to be encouraged rather than discouraged. To hold with defendant on this subject would be to require the useless repetition of allegations in a pleading, and make them unnecessarily long and prolix.

3. The plaintiff is a corporation, and defendant claims that the matter set up in the third cause of action was libellous as to the individual officers, and not as to the corporation. The libellous matter is as follows:

"As to reliability; the president of the company has been connected with at least one unsavory mutual insurance scheme,—a once notorious life insurance company of Montevideo, Minn., and it is said that the head pushers in the Dakotas are men who were prominent in the Amboy and other plundering hail insurance companies of this state."

The question presented by this objection is covered by the case of *Martin Co. Bank v. Day*, 73 Minn. 195, 75 N. W. 1115. We need only to refer to the decision in that case. It is a complete answer to defendant's contention.

4. No facts are alleged in the complaint on which to base defendant's contention that the libellous article was privileged. It does not appear that defendant had any interest in the subject-matter of the article, nor that it owed any duty with reference thereto towards any person having an interest therein. Nor does it contain

any allegations from which good faith on defendant's part can be spelled out. On the contrary, the complaint charges defendant with express malice.

For these reasons, briefly expressed, we conclude that the complaint is not open to the objections urged against it, and the order overruling defendant's demurrer thereto is affirmed.

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**JAMES M. ELDER v. GRAND LODGE OF ANCIENT ORDER OF  
UNITED WORKMEN.**

May 22, 1900.

Nos. 12,117—(127).

**Benefit Insurance—Payment of Assessments—Waiver.**

J. R. E. held a certificate of insurance in defendant association, and was a member of one of its subordinate lodges. The by-laws of the order, which are a part of the contract of insurance, require assessments against members to be paid on or before the 28th day of the month in which made, in default of which the member becomes suspended without action on the part of the lodge. *Held*, that the custom or habit of the collecting or receiving officer of such subordinate lodge in permitting the insured to pay assessments after default, between said 28th of the month and the lodge meeting next following, is not binding on defendant, it not appearing that the subordinate lodge had any notice or knowledge of such custom or habit, and it not appearing that such collecting officer had any authority to waive a strict compliance with the by-laws in that respect.

**Same—Custom of Subordinate Lodge.**

During the time of his membership in said association—four years—a large number of other members of the subordinate lodge of which he was so a member were suspended, in accordance with the by-laws, for non-payment of assessments made against them. *Held*, that the custom and habit of such subordinate lodge in restoring and reinstating such suspended members, the reinstatements being made under and pursuant to its by-laws, did not constitute a waiver of the prompt payment of future assessments, nor establish a right of restoration to membership.

**Compliance with Contract not a Waiver.**

A compliance with the terms and conditions of a contract of insurance

79	468
85	397
85	398
e85	400

on the part of the insurer cannot be construed as a waiver of the terms of the contract thus complied with.

Action in the district court for Crow Wing county to recover \$2,000 on a certificate of insurance. The case was tried before Holland, J., who found in favor of plaintiff. From a judgment entered pursuant to the findings, defendant appealed. Reversed.

*E. & W. N. Southworth and Chas. G. Hinds, for appellant.*

*S. F. Alderman and W. S. McClenahan, for respondent.*

BROWN, J.

This is an action to recover upon a certificate of insurance issued by defendant on the life of plaintiff's brother, plaintiff being the beneficiary named therein. The cause was tried below before the court without a jury, and judgment was awarded to plaintiff, from which defendant appeals.

The facts in the case are as follows: The Ancient Order of United Workmen is a benevolent, charitable, and fraternal insurance association. It is composed and made up of three different, though not wholly independent, organizations: (1) A supreme lodge, having a general supervision and jurisdiction over the whole order; (2) a state grand lodge, deriving authority from the higher order; and (3) a subordinate lodge or lodges chartered and constituted by the grand lodge, and located at different points in the state. The grand lodge, defendant in this case, is the general contracting and responsible body of the order. No contract of insurance is valid unless approved by its officers. All certificates of membership are issued by it, all assessments upon the members are made by it, and it is alone responsible for the payment of all death losses. The subordinate lodges have primary authority to admit applicants to membership, subject to regulations imposed by and to the approval of the grand lodge. They have a general charge and supervision of the matter of collecting and receiving assessments duly levied upon the members, making due report thereof to the grand lodge. They have also authority, under certain conditions and restrictions, to restore and reinstate suspended members.

The deceased, J. R. Elder, duly became a member of a subordinate lodge of such order, and received a certificate of such member-



ship in due form, which certificate contained, among other things, the following condition, namely:

"This certificate is issued upon the express condition that said J. R. Elder shall in every particular comply with all the laws, rules, and requirements of said order."

Similar certificates are issued to all members. Payment of such certificates in case of the death of the insured, is made from a "beneficiary fund" controlled and maintained by the grand lodge. This fund is made up of assessments of one dollar upon each certificate holder of the association for every death of a member. All such assessments are made on the first of the month, and are payable on or before the 28th of the month in which so made. A failure to pay any such assessment within such time operates to suspend the member so in default, without any act or declaration on the part of the subordinate lodge. Deceased became a member of such society in 1892, and continued such until the time of his death on November 24, 1896, unless such membership ceased and ended upon his default and failure to pay an assessment made against him on August 1 preceding. An assessment was then duly made, but was never paid by deceased, or by any one for him.

The contention on the part of the defendant is—and this embodies its whole defense to the action—that by his failure to pay such assessment Elder became suspended by force and operation of the by-laws of the order, and all rights under the certificate were thereby forfeited. The by-law on this subject, which is a part of the contract of insurance, and which deceased, by the condition of his certificate aforesaid, agreed to comply with, is as follows:

"Any member who fails to pay all such assessments on or before the 28th day of the month in which the assessment is made, shall, by such nonpayment alone, stand suspended, without any action by the lodge, or any officer thereof; and the beneficiary of any such member under his certificate shall thereafter have no claim whatever upon the beneficiary funds of the order, unless such member be reinstated as the laws of the order require."

Plaintiff concedes that the assessment of August 1 was duly and properly made, and that it was never paid, but contends that the conduct of defendant and the subordinate lodge of which deceased

was a member, with reference to the receipt and acceptance of assessments after they were past due, and its conduct in restoring and reinstating suspended members upon such payment being made, was such as to constitute a waiver of prompt payment, and to estop it from insisting upon the default. At the opening of the trial in the court below the parties entered into the following stipulation, viz.:

"If the conduct and dealing of the defendant prior to September 1, 1896, has been such as to waive prompt payment of assessments on the part of its members, and to authorize a delay upon their part, such as existed in this case, the defendant is liable; if there has not been such conduct and dealing on the part of the defendant with its members as to waive such prompt payment and authorize the delay which existed in this case in making payment of assessment number twelve, the defendant is not liable."

So we have for consideration the questions whether the conduct of the subordinate lodge, or its collecting or receiving officer, in the matter of receiving payment of past-due assessments in disregard of the by-laws, or the conduct and custom of such lodge in restoring and reinstating suspended members to all rights in the order upon payment of all assessments in arrear was such as to amount, in law, to a waiver of prompt and timely payment, and to estop it from insisting on a forfeiture. The court below found such waiver, and ordered judgment against defendant. There is no dispute as to the fact, and the question whether a waiver is shown is one of law, to be determined from all the evidence.

We find nothing in the evidence with reference to the conduct of the subordinate lodge, or its collecting officer, in receiving overdue assessments from deceased in disregard of the by-laws, to constitute or create such a waiver. It is the duty of the officer who receives payment of dues and assessments from members to report at the lodge meeting following the 28th of the month in which they are made all who are delinquent and in arrears, and the most that the evidence shows in this connection is that deceased was permitted by such officer to pay past-due assessments on several different occasions between the 28th of the month and the next following lodge meeting. But there is no evidence from which it can be found that the lodge, as a body, had any notice that the

by-laws were being thus disregarded, or any evidence that the conduct of such officer was in any way authorized, sanctioned, or ratified. In all instances of such payments deceased was duly reported by such officer as having paid his assessments in due time, and in no instance was he reported as being in default. The evidence does not show that the conduct of the officer ever came to the notice of his lodge, and it cannot be presumed that he had authority to disregard or waive the by-laws, and defendant is not bound by his acts in this regard. *Bryan v. National*, 21 R. I. 149, 42 Atl. 513; *Supreme Lodge v. Oeters*, 95 Va. 610, 29 S. E. 322. He had no other or greater authority under the by-laws than to receive payment of assessments, and to make report to the lodge of members who failed to pay. On three different occasions deceased was reported as suspended for the nonpayment of assessments, but was subsequently reinstated by the lodge upon payment being made.

From a careful consideration of the evidence on this branch of the case, we conclude that the conduct of the officer or of the lodge itself in restoring deceased to membership in the three instances mentioned, cannot be construed as a waiver of prompt and timely payment of future assessments. Counsel for respondent do not seriously contend that such conduct does amount to a waiver. Their main contention, and the principal ground upon which they seek to sustain the court below, is that the conduct and custom of the lodge in reinstating members generally who had been actually suspended for nonpayment of assessments was such as to constitute such a waiver. Whether a waiver is so shown is the only remaining question in the case.

A waiver of the terms of a contract, so far as applicable to this case may be said to consist in the doing of some act which is inconsistent with an intention to insist on a strict performance, or a course of conduct inconsistent with and in disregard of the terms of the contract. The evidence in this case shows that during the four years deceased was a member a large number of other members of the lodge to which he belonged were suspended for nonpayment of assessments at different times and dates, and that all of them, with one exception, were restored and reinstated upon payment of all arrearages. It is urged by counsel for plaintiff that the conduct

and custom of the lodge in this respect continued as it was during all of such time, misled its members, and created the belief that prompt payment would not be insisted upon. We cannot concur in this contention. It was held in the case of *Mueller v. Grand Grove U. A. O. D.*, 69 Minn. 236, 242, 72 N. W. 48, that if deceased

"Was permitted without objection to pay his dues at irregular intervals, this permission covering a period of more than three years, the subordinate grove accepting his money, without the slightest objection, when he got ready to pay it, there was a waiver of strict compliance with the various articles which required prompt payment. \* \* \* The defendant could not, after long-continued conduct of this nature, by which he was lulled into the conviction that this delay was unobjectionable and his good standing unaffected, suddenly, and without notice, insist upon the forfeiture, and that he was no longer in good standing, and had forfeited all rights and privileges."

We have no intention of departing from this legal principle. It is sound, equitable, and just, but has no application to the facts in the case at bar. In that case there was, on the part of the subordinate grove, a deliberate disregard of the by-laws of the association, conduct inconsistent with an intention to enforce them. Overdue assessments were accepted from the insured without much regard to the length of time they were past due, in total disregard of the rules of the order, and without suggestion that he had been or was liable to be suspended.

In this case the evidence furnishes no intimation that the by-laws were ever ignored or disregarded by the subordinate lodge. On the contrary, it appears that they were always put into operation and effect. Members in default were reported by the proper officer as suspended, and they remained suspended until restored to membership by affirmative action of the lodge upon payment of past-due assessments. It is true that no formal application for such restoration was made by the suspended member, but it seems reasonably clear that the payment of the assessment to the proper officer was considered by the member as a sufficient application, and it was treated as such by the lodge. The *Mueller* case may be distinguished on other grounds, but it is unnecessary to continue the subject. The fact that there was a disregard of the rules and by-laws

of the order in that case, and a strict observance of them in this case, renders it inapplicable here.

The by-law above set out provides that all members became suspended upon a failure and default to make prompt payment of assessments. This suspension follows a nonpayment, without any action on the part of the lodge, and it continues until the member is restored in accordance with other by-laws. During such suspension the certificate of membership is of no force or validity, and all its rights thereunder are suspended also. The by-laws on the subject of reinstatements and restorations are as follows:

“Section 1. Any member suspended by reason of nonpayment of assessment may, if living, be reinstated at any time within three months from the date of such suspension upon the following conditions, and not otherwise, that is to say:

(1) The amount of all assessments for nonpayment of which the member became suspended, and also of all assessments that were made thereafter and up to the date of applying for reinstatement, shall be deposited with the financier of the lodge.

(2) The lodge shall, by a majority of those present and voting at a regular meeting thereof, determine whether or not such member shall be reinstated. \* \* \* When all the foregoing conditions have been fully complied with, and not before, the member shall be held as reinstated, and his certificate again in full force.”

Other provisions on this subject need not be referred to. The foregoing is sufficient to show the procedure essential to the restoration of a suspended member. The requirements and provisions of these laws were always followed, and in no instance were they disregarded. The delinquent members were uniformly suspended for their nonpayment of assessments, and subsequently reinstated upon application and payment of arrears. The mere payment of past-due assessments gave no right to restoration. Affirmative action on the part of the lodge was necessary to effect that result,—a majority vote of the members at a regular lodge meeting. The defendant had no control over the vote of the members. They were at liberty to vote as their discretion and inclination prompted them. Under such circumstances, and in the face of such an observance of the terms and provisions of the contract on the part of the defendant and the subordinate lodge, can it be held that the de-

fendant waived the terms of the contract thus complied with and obeyed? We think not. It is true that the lodge of which deceased was a member was quite liberal in the matter of restoring suspended members, but, as it uniformly followed and pursued its by-laws, the custom in that regard cannot give rise to a right to insist on other reinstatements. In other words, a compliance with the terms of a contract cannot be turned or converted into a waiver of the terms of the contract complied with. This precise point was involved and considered in the case of *Crossman v. Massachusetts*, 143 Mass. 435, 9 N. E. 753, and we quote from the opinion:

"The plaintiff further contends, that the superior court erred in the ruling that there was no evidence which would warrant the jury in finding that the defendant had waived the provisions of the contracts rendering them void upon failure to pay the assessment within thirty days. The evidence shows that the deceased was habitually unpunctual in paying his assessments, and that, in many instances, the defendant received the assessments after they were due, and reinstated him as a member of the association. \* \* \* But there is no evidence to show that the defendant intended to waive the future prompt payment of assessments as one of the conditions of the contract, or that the deceased, as a reasonable man, was led to believe by its actions that it had waived this condition."

See also *Easley v. Valley*, 91 Va. 161, 21 S. E. 235.

So we conclude that the evidence falls as far short of showing a waiver in this respect as with respect to the conduct of the collecting officer in receiving payment of past-due assessments between the 28th of the month in which made and the lodge meeting following, and it follows that the findings of the court below are not justified by the evidence. We are not unmindful of the fact that the law abhors forfeitures, and that courts will, perhaps, enlarge and expand ordinary rules of application of evidence to defeat them. But cold facts cannot be ignored, or a party relieved from the consequences of his neglect, except upon some recognized principle of equity and justice. Such is not this case.

Judgment reversed.

**WEALTHY PHELPS v. GEORGE S. HEATON and Others.**

May 25, 1900.

Nos. 12,086—(79).

**Vacating Judgment—Notice to Attorney of Nonresident.**

Notice of a motion to vacate a judgment in favor of a nonresident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof.

**Infant—No Waiver of Right Possible.**

An infant defendant is incompetent to waive or admit service of the summons upon him, or to confer jurisdiction upon the court by a voluntary appearance.

**Jurisdiction over Infant—Guardian ad Litem.**

Service of summons upon an infant defendant in the mode authorized by the statute must precede the appointment of a guardian ad litem for him, and though such guardian be appointed, and he appears and represents the interests of the minor, the appointment and all subsequent proceedings in the action, including the final judgment, are void as against the infant not served with process or summons.

Action in the district court for Blue Earth county to reform a deed and to bar the title of Julius Heaton and three others, minors, in the premises. The case was tried before Severance, J., who found in favor of plaintiff, and judgment pursuant to the findings was entered. Subsequently to the coming of age of the minors an order was made vacating the judgment, from which order plaintiff appealed. Affirmed.

*Pfau & Pfau and L. W. Prendergast*, for appellant.

An attorney can act during pendency of the action, or within two years after judgment rendered, to the extent that he may within that time receive the money and satisfy the judgment. There is no presumption that beyond this time he has authority to act in any capacity whatever. Plaintiff was not a resident of the state. If the relationship of client and attorney did not then exist, there was no duty resting on the attorney to give notice to his client. There can be no presumption that notice was given, and even if notice

was received there would be no presumption that it was served within the time required by law. Service in such case must be made on the party in person. *Savings Bank of St. Paul v. Authier*, 52 Minn. 98; *Berthold v. Fox*, 21 Minn. 51; G. S. 1894, § 6184; *Bray v. Doheny*, 39 Minn. 355; *Hinkley v. St. Anthony Falls W. P. Co.*, 9 Minn. 44 (55); *Sheldon v. Risedorph*, 23 Minn. 518; *Bathgate v. Haskin*, 59 N. Y. 533; *In re Grundysen*, 53 Minn. 346; *McLain v. Watkins*, 43 Ill. 24; *Walradt v. Maynard*, 3 Barb. 584, 587; *Benedict v. Smith*, 10 Paige, 126; *Jackson v. Bartlett*, 8 Johns. 281; *Cruikshank v. Goodwin*, 66 Hun, 626. After judgment entered, where there is nothing further to be done in the matter of execution, etc., the employment of the attorney presumptively ceases, and notice to an attorney of a motion to set aside judgment is no notice to the former client, unless continuance of the relation is affirmatively shown. *Grames v. Hawley*, 4 McCrary, 61. The court had no authority to set aside this judgment after nine years, unless on the ground that no jurisdiction had been acquired over the moving defendants. The statutes give no authority to set aside judgment after this lapse of time for any reason. In equity the court may not set aside its decree after the term in which it was entered. *Cameron v. M'Roberts*, 3 Wheat. 591. The court could have no right to take in consideration on this motion any matters save those affecting the jurisdiction. The moving parties attacked the judgment for other grounds. 1 Story, Conf. Laws, 607; *Wimberly v. Hurst*, 33 Ill. 166; *Conner v. Hutchinson*, 12 Cal. 127; *Bissell v. Briggs*, 9 Mass. 461; *D'Arcy v. Ketchum*, 11 How. 165, 175; *Dorman v. State*, 56 Ind. 454, 457. In absence of allegations that the guardian ad litem was acting in collusion with plaintiff or by her authority, or that plaintiff was a party to the alleged frauds, the statement in the motion of acts done or omitted on part of the guardian is inconsequent and conveys nothing. *Meka v. Brown*, 84 Iowa, 711. In any event, the negligence of the attorney is uniformly treated as the negligence of the client. *Merritt v. Putnam*, 7 Minn. 399 (493); *Austin v. Nelson*, 11 Mo. 192; *Matthis v. Inhabitants*, 62 Mo. 504; *Jones v. Leech*, 46 Iowa, 186; *Spaulding v. Thompson*, 12 Ind. 477.

.. If an infant would disaffirm his contract, and receive back his



property, he must refund what he has received. *Kerr v. Bell*, 44 Mo. 120; *Highley v. Barron*, 49 Mo. 103. A minor must disaffirm within a reasonable time after coming of age. *Goodnow v. Empire L. Co.*, 31 Minn. 468; *Cochran v. Toher*, 14 Minn. 293 (385); *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 119 (133). If, when he attains his majority, an infant has the money or property received in consideration for his deed or contract, he must return it, or so much of it as he has left, before he will be allowed to disaffirm. *Chandler v. Simmons*, 97 Mass. 508; *Green v. Green*, 69 N. Y. 553; *Becker v. Pugh*, 9 Colo. 589; *Lawson v. Lovejoy*, 8 Me. 405; *Tyler, Infancy* (2d Ed.) § 37. The long silence, laches, and inexcusable delay amount to express ratification of the proceedings had in 1889. Where an infant, after coming of age, uses the consideration and allows land to increase in value, and does not disaffirm, it is delay so unreasonable as to amount to waiver, and is equivalent to express ratification. *O'Dell v. Rogers*, 44 Wis. 136; *Goodnow v. Empire L. Co.*, supra; *Jenkins v. Esterly*, 24 Wis. 340; *Dolph v. Hand*, 156 Pa. St. 91; *Lenhart v. Ream*, 74 Pa. St. 59. See also *Spaulding v. Farwell*, 70 Me. 17; *Godden v. Kimmell*, 99 U. S. 201; *Frost v. Walls*, 93 Me. 405; 2 *Pomeroy*, Eq. Jur. §§ 917, 965; *Ketsey's Case*, Cro. Jac. 320; *Hubbard v. Cummings*, 1 Me. 11; *Bigelow v. Kinney*, 3 Vt. 353; *Baker v. Kennett*, 54 Mo. 82; *Roberts v. Wiggin*, 1 N. H. 73; *Boody v. McKenney*, 23 Me. 517; *Walsh v. Powers*, 43 N. Y. 23; *Callis v. Day*, 38 Wis. 643; *Kemp v. Cook*, 18 Md. 130.

The court may acquire jurisdiction over infant defendants of the age of fourteen in the same manner as over adult defendants. *Eisenmenger v. Murphy*, 42 Minn. 84. But in any case in Minnesota the court may acquire jurisdiction over defendants without service of summons. G. S. 1894, § 5209. It follows that at least such infant defendants may voluntarily appear and submit to the jurisdiction as completely as if summons were served on them. An infant of the age of fourteen is presumed to be a person of legal discretion, and hence the court, in acquiring jurisdiction, treats him as it does adult defendants. *Temple v. Norris*, 53 Minn. 286.

Under G. S. 1894, § 6152, at least the three elder infant defendants had the right to apply personally for appointment of a guardian ad litem. It is immaterial how or by whom their petition

was presented. The presumption is that it was duly presented, and that the court duly acted. If there was any irregularity in obtaining service, it would simply make the judgments voidable, and the infant must disaffirm within a reasonable time after coming of age. *Eisenmenger v. Murphy*, *supra*; *Hoover v. Kinsey*, 55 Iowa, 668; *Freeman*, Judg. §§ 151, 513; *Moore v. Starks*, 1 Oh. St. 369; *Lessee of Nelson v. Moon*, 3 McLean, 319; *Gronfier v. Puymiol*, 19 Cal. 629; *Jenkins v. Esterly*, *supra*; *Goodnow v. Empire L. Co.*, *supra*; *Bennett v. Fenton*, 41 Fed. 283. See also *Feikert v. Wilson*, 38 Minn. 341; *Bryan v. Kennett*, 113 U. S. 179; *Hale v. Hale*, 146 Ill. 227; *Levystein v. O'Brien*, 106 Ala. 352.

*S. B. Wilson and Fowler & McNamara*, for respondents.

A court may at any time clear its records of unauthorized entries. *Heffner v. Gunz*, 29 Minn. 108; *Feikert v. Wilson*, 38 Minn. 341. Defendant does not waive a jurisdictional objection, or appear generally, by coupling with a motion to vacate a judgment for want of jurisdiction other grounds of relief not inconsistent with it. *Godfrey v. Valentine*, 39 Minn. 336. The judgment is void because it is based solely on a purported admission of service outside the state. Service of summons outside the state would, of course, be ineffectual, and admission of such service cannot have any greater effect than such service itself. *Weatherbee v. Weatherbee*, 20 Wis. 526. A minor cannot accept service, or waive any formula of service. *Winston v. McLendon*, 43 Miss. 254; *Kansas v. Campbell*, 62 Mo. 585; *Armstrong v. Wyandotte*, 1 McCahon, 576; *Crouter v. Crouter*, 133 N. Y. 55. When the record shows service to have been made in some particular way, there is no presumption that it was made in any other way. *Ely v. Tallman*, 14 Wis. 28; *Morey v. Morey*, 27 Minn. 265, 267; *Barber v. Morris*, 37 Minn. 194, 196; *Jewett v. Iowa L. Co.*, 64 Minn. 531; *Brown v. St. Paul & N. P. Ry. Co.*, 38 Minn. 506. Service of summons must be made on minors precisely as the statute prescribes, or jurisdiction does not rest. Where there is not such service of summons in the first instance, appointment of a guardian ad litem does not cure the defect. Jurisdiction must be acquired over the infant before there is any authority to appoint a guardian ad litem. Without service on the

infant in one of the modes required the appointment is nugatory, and a judgment void though answer be interposed by the guardian ad litem and trial had. *Helms v. Chadbourne*, 45 Wis. 60; *Foster v. Hammond*, 37 Wis. 185; *Insurance Co. v. Bangs*, 103 U. S. 435; *Johnston v. San Francisco*, 63 Cal. 554; *McCloskey v. Sweeney*, 66 Cal. 53; *Ingersoll v. Mangam*, 84 N. Y. 622; *Crouter v. Crouter*, supra; *Darrow v. Calkins*, 154 N. Y. 503; *Allen v. Saylor*, 14 Iowa, 435; *Good v. Norley*, 28 Iowa, 188; *Gibson v. Chouteau*, 39 Mo. 536; *Robbins v. Robbins*, 2 Ind. 74; *Ardil v. Ardil*, 26 Ind. 287; *Roy v. Rowe*, 90 Ind. 54; *Whitney v. Porter*, 23 Ill. 445; *Clark v. Thompson*, 47 Ill. 25; *Hodges v. Wise*, 16 Ala. 509; *Taylor v. Walker*, 1 Heisk. 734; *Lenox v. Notrebe*, 1 Hemp. 251; *Frazier v. Pankey*, 1 Swan (Tenn.) 75; *Linnville v. Darby*, 60 Tenn. 306; *Cox v. Story*, 80 Ky. 64; *Wornock v. Loar* (Ky.) 11 S. W. 438; *Finley v. Robertson*, 17 So. C. 435; *Genobles v. West*, 23 So. C. 154; *White v. Albertson*, 3 Dev. (N. C.) 241; *Young v. Young*, 91 N. C. 359; *Sprague v. Haines*, 68 Tex. 215; *Kremer v. Haynie*, 67 Tex. 450; *Ivey v. Ingram*, 4 Cold. 129.

START, C. J.

This action was commenced March 13, 1889, in the district court of the county of Blue Earth, for the purpose of reforming a certain deed described in the complaint, and to bar all title of the defendants Julius Heaton, Frank Heaton, Nellie May Heaton, Bertha Maude Heaton, and each of them, in and to the land described in such deed and in the complaint.

The defendants specially named were then infants residing in the state of Wisconsin. All of them were over fourteen and under twenty years of age, except Bertha Maude Heaton, who was then thirteen years of age. The summons was never served, either personally or by publication, on any of them. Each of them signed an admission which was indorsed on the summons, and was in these words, "Due and personal service of this within summons is hereby admitted at Marquette county, in the state of Wisconsin, on this 15th day of March, A. D. 1889," which was filed in this action November 4, 1889. On April 15, 1889, they each signed a petition entitled in this action, which stated that they were minors and that

this action had been commenced against them by the service of the summons upon them, and asked that Benjamin D. Smith, of Mankato, Minnesota, be appointed their guardian ad litem in the action. A notice directed to the defendant Bertha Maude Heaton, stating the time and place when and where the plaintiff would apply to the court for the appointment of a guardian ad litem for her in this action, was also published and mailed to her. Thereafter Mr. Smith was appointed by the court guardian ad litem for all of them, and answered for them, denying the allegations of the complaint.

Other than as here stated, the court never acquired jurisdiction over the person or property of the defendants named. Judgment in form was entered against them on November 5, 1889, for the relief demanded in the complaint. None of them had any knowledge of the entry of such judgment until the last of October, 1897, when they learned of its entry through their attorney. At this time they all had reached their majority. The plaintiff is not a resident of this state, nor has she been since the commencement of this action.

The defendants who were minors when this action was commenced made a motion herein on February 23, 1899, to vacate the judgment so entered against them, on the ground that the court never acquired jurisdiction of them. The motion also stated other grounds (not inconsistent with lack of jurisdiction) for setting the judgment aside, which were to the effect that the guardian ad litem failed to plead the statute of limitations, or to call as a witness the attorney who drafted the deed in question, who then lived in Mankato, and would have testified that the deed was drawn strictly in accordance with the agreement and intention of the parties thereto. The notice of motion was served upon one of the plaintiff's attorneys of record in the action. At the time set for the hearing of the motion the plaintiff appeared specially, and moved the court to dismiss the motion upon the ground that no notice thereof had been served upon her, or upon any one upon whom such service might be lawfully made. The court overruled the motion to dismiss. The plaintiff excepted to the ruling, and then appeared and took part in the hearing of the motion on the merits. After hearing the respective parties on affidavits, includ-

ing that of the plaintiff, and evidence offered by each, the trial court made its order vacating the judgment, and the plaintiff appealed from the order to this court.

1. The first assignment of error to be considered is that the court erred in overruling plaintiff's motion to dismiss on the ground that no notice of the motion to vacate the judgment had been served upon her.

Whether the plaintiff, by taking part in the hearing of the motion on the merits, waived the alleged defects in the service of the notice of the motion, we do not decide, as we are of the opinion that service on her attorney of record was proper, in view of the facts of this case. The general rule is that the authority of an attorney to represent his client expires with the entry of a final judgment, except that by virtue of our statute he may collect and discharge the judgment at any time within two years after its entry. If, therefore, the plaintiff had been a resident of the state, and subject to the process of the court, it may be conceded that it would have been error to have served the notice to vacate the judgment upon the attorney of record, and not upon her. *Berthold v. Fox*, 21 Minn. 51. But such is not this case. The plaintiff, a nonresident, appeared in court in this action by her attorney, and caused to be spread upon its records a judgment in form against the defendants, which they claim is absolutely void because the court was without jurisdiction in the premises. If the judgment is void, the court has a right to purge its records of the unauthorized entry of the judgment at any time when its attention is called to the matter, upon such reasonable notice as it is practical to give. *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342; *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 585. This does not necessarily require service of the notice of the motion upon the plaintiff personally, otherwise the judgment could not be vacated unless she came within the territorial jurisdiction of the court.

Where, as in this case, the plaintiff is a nonresident, the rules of practice adopted by the court must furnish some means whereby the defendant may call the attention of the court to the void judgment and secure its vacation. Notice in such cases to the attorney who secured the entry of the judgment is as practical and efficient

a method of securing actual notice to the plaintiff, and protecting the judgment from an unlawful attack, as can be adopted; for the regularity of the attorney's own conduct, or his skill or care as a lawyer, is drawn in question by the attack on the judgment. Having secured the judgment for a nonresident client, he is, or ought to be, interested in maintaining it. We therefore hold, upon principle and authority, that notice of a motion to vacate a judgment in favor of a nonresident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof. *Lee v. Brown*, 6 Johns. 132; *Lusk v. Hastings*, 1 Hill, 656; *Drury v. Russell*, 27 How. Pr. 130; *Doane v. Glenn*, 1 Colo. 454; *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095.

2. This brings us to the merits of the order appealed from. If the court never acquired jurisdiction of the infant defendants in this case, the judgment as to them is void, and the court was authorized to vacate it, without reference to the time when it was entered. *Feikert v. Wilson*, *supra*; *Furman v. Furman*, 153 N. Y. App. 309, 60 Am. St. Rep. 642, notes. The question then is, did the court acquire jurisdiction of these defendants? We answer the question in the negative.

The record shows that the summons was never served upon any of them, either personally or by publication. Infants cannot waive their rights, because of want of capacity to do so. This is elementary. Therefore service of the summons upon minors must be made as the statute directs. It is not claimed in this case that any attempt was ever made to serve in any manner the summons upon the defendants who were minors. It is, however, claimed that the court acquired jurisdiction over them, and power to appoint a guardian ad litem for them, by virtue of their admission of service. The short answer to this is that minors have not capacity to waive or admit service of process upon them (10 Enc. Pl. & Pr. 612), and, further, that as to the defendants who were over fourteen years of age the manner of serving summons upon them was precisely the same as in the case of adults, and, therefore, when they petitioned the court to appoint a guardian ad litem for them, it was a voluntary appearance within the meaning of G. S. 1894, § 5209. It is true

that the mode of acquiring jurisdiction over an infant fourteen years of age or upward is by the service of the summons upon him as in the case of adult defendants, but he can only appear in the action by a guardian ad litem. If the court once acquires jurisdiction over him by the service of the summons, his appearance without the appointment of such guardian for him does not affect the jurisdiction of the court in the premises. His appearance in such a case is an irregularity only. *Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784. It is only after the service of the summons upon such an infant defendant that he is authorized to apply to the court for the appointment of a guardian ad litem for him. G. S. 1894, § 5162.

To hold that the court can acquire jurisdiction over a defendant who is a minor, without the service of process upon him by appointing a guardian ad litem for him, even upon his personal application, is to hold that he may waive the service of process upon him, which he is without capacity to do. The application for the appointment of such guardian must in all cases be made after service of the summons on the infant defendant, or the court is without jurisdiction over him, although the guardian be appointed and answers for him. *Ingersoll v. Mangam*, 84 N. Y. 622; *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726; *Johnston v. San Francisco*, 63 Cal. 554; *McCloskey v. Sweeney*, 66 Cal. 53, 4 Pac. 943; *Insurance Co. v. Bangs*, 103 U. S. 435; 10 Enc. Pl. & Pr. 643. The rule as to acquiring jurisdiction of an infant defendant is that service of summons upon him in the mode authorized by the statute must precede the appointment of a guardian ad litem for him, and though such guardian be appointed, and he appears and represents the interests of the minor, the appointment and all subsequent proceedings in the action, including the final judgment, are void as against the infant not served with process or summons. This rule is sustained by the great weight of judicial authority. There are only a few adjudged cases to the contrary. 1 Freeman, Judg. § 151.

It follows that the judgment in this case was void, not simply voidable; for the summons was never served on the infant defendants, hence the court never acquired jurisdiction of them. Such being the case, it is unnecessary to refer to the other assignments

of error, for they are manifestly without merit, or they are relevant only in case it were held that the judgment was voidable, not void. Order affirmed.

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GOTTFRIED STROBEL v. GEORGE SCHULTE and Another.

May 25, 1900.

Nos. 12,088—(100).

**New Trial after Verdict—Hicks v. Stone Followed.**

The preponderance of the evidence in this case is not so manifestly in favor of the verdict as to justify a reversal of the order granting a new trial.

Action in the district court for Blue Earth county to recover \$200 damages for trespass. The case was tried before Severance, J., and a jury, which rendered a verdict in favor of defendants. From an order granting a motion for a new trial, they appealed. Affirmed.

*Thos. Hughes and W. E. Young*, for appellants.

*Lorin Cray and Pfau & Pfau*, for respondent.

START, C. J.

On the north line of the plaintiff's farm there is a public highway, in the township of Mankato, running east and west across a small slough. The outlet of this slough is a small, natural stream, which starts at its southerly edge on plaintiff's land, and runs south-easterly to a lake. On July 10, 1897, the defendants entered upon the plaintiff's land and dug or cleared out a ditch thereon from the south side of the highway to the head of the stream. This action was brought to recover damages for the alleged trespass.

The defendants' alleged justification of such entry was that the locus in quo was at the time and had been for more than twenty years a public ditch, maintained by the public, and used for the purpose of draining the highway at the point where it crosses the slough, and that the defendant Schulte, as one of the town supervisors, with the assistance of his codefendant, lawfully entered upon the premises and cleaned out the ditch. On the trial the defendants claimed that the public had acquired an easement to use



and maintain the ditch for the purpose of draining the highway by adverse possession and user. The jury found for the defendants. Thereupon the plaintiff made an alternative motion for judgment notwithstanding the verdict, or for a new trial. The court granted a new trial, and the defendants appealed from the order.

The only question for the decision of this court is whether this case falls within the doctrine of *Hicks v. Stone*, 13 Minn. 398 (434). The defendants claim that it does, for the reason that the evidence is practically conclusive that the public used the ditch in question continuously to drain its highway from 1870 to 1895, when the plaintiff wrongfully closed it. On the other hand, the plaintiff, not to be outdone by the defendants, claims that the evidence is conclusive that the public never acquired by prescription or otherwise an easement to maintain the ditch, and that he is entitled to judgment notwithstanding the verdict. Neither party is right. It will not serve any practical purpose to discuss the evidence. We have examined it, and reached the conclusion that the preponderance of the evidence is not so manifestly in favor of the verdict as to justify a reversal of the order granting a new trial.

Order affirmed.

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CHRISTOPHER H. SMITH v. NATIONAL CREDIT INSURANCE  
COMPANY and Others.

May 25, 1900.

Nos. 12,098—(105).

**Credit Insurance—Distribution of Fund—Judgment as Evidence.**

This is an action on behalf of policy holders of the defendant insurance company to have certain securities declared a trust fund for them, and to distribute the proceeds thereof to them ratably. *Held*, following *Smith v. National C. Ins. Co.*, 78 Minn. 214, that the findings of fact as to respondent's claim do not sustain the conclusion of law allowing her claim, and permitting her to share in the distribution of the fund.

Appeal by Kentucky Jeans Clothing Company from a judgment of the district court for Hennepin county allowing the claim of Almenda L. Renshaw against defendant company, and permitting

her to share in the fund involved in the action, entered pursuant to the findings of Harrison, J., **Reversed.**

*C. J. Rockwood*, for appellant.

*John F. Byers*, for respondent.

START, C. J.

This action was brought by the insurance commissioner, in behalf of all policy holders of the defendant insurance company, to have certain securities which were deposited pursuant to G. S. 1894, § 3332, et seq., declared a trust fund for such policy holders, and to distribute the proceeds thereof to them ratably. This is the fourth appeal in the case. See 65 Minn. 283, 68 N. W. 28; 72 Minn. 364, 75 N. W. 596; and 78 Minn. 214, 80 N. W. 966. The respondent, Almenda L. Renshaw, appeared and answered, asserting a right to share in the distribution of the fund. A large number of other claimants also answered. The trial court made its findings of fact and conclusions of law, and judgment was entered allowing the respondent's claim, and permitting her to share in the distribution of the fund. The Kentucky Jeans Clothing Company, a creditor entitled to share in the fund, appealed from so much of the judgment as related to the respondent's claim. The judgment was entered November 21, 1899, and, so far as appears from the record, the appellant is the only creditor who has appealed therefrom.

The sole question for our decision on this appeal is whether the findings of fact as to the respondent's claim justify the conclusion of law and judgment allowing respondent's claim, and permitting her to share in the distribution of the fund. The findings of fact as to respondent were to the effect following: That the insurance company, in consideration of a premium, issued to James S. Cochran & Brother a policy of insurance; that said Cochran & Brother claimed to have suffered losses within the provisions of the policy, in excess of all offsets and reductions, to the amount of \$7,133.61, and assigned their claim to the respondent, Renshaw; that the respondent commenced an action in the court of common pleas, county of Philadelphia and state of Pennsylvania, on July 18, 1895, against the Credit Insurance Company, "to recover the said claim"; that the insurance company appeared and defended the action; that

after the assignment of the Credit Insurance Company for the benefit of its creditors, which is shown by the complaint in this action to have occurred on September 10, 1895, the assignee duly defended the action; that thereafter such proceedings were had that on or about March 14, 1896, the respondent recovered judgment, which was duly given by such court against the insurance company, upon said claim arising upon the said policy of insurance, for the sum of \$7,470.24; and that no part of the judgment has been paid.

The simple fact that the respondent is a judgment creditor of the insurance company does not entitle her to share in the distribution of the fund. Her judgment, as against other creditors, is evidence only of a debt against the insurance company as of the date of its rendition. It does not establish the fact that she has a valid claim against the insurance company for a loss under its policy, which is the essential basis of any equity to participate in the distribution of the fund. The trial court does not find that the respondent's assignors sustained a loss under the policy, but only that they so claimed. Therefore the finding is insufficient to sustain the conclusions of law and judgment. The case of *Smith v. National C. Ins. Co.*, 78 Minn. 214, 80 N. W. 966, is precisely in point, and rules this case. The findings of fact do not sustain the conclusions of law as to respondent's claim. While the appellant is the only creditor that has appealed from the judgment, yet the benefit of a disallowance of the respondent's claim cannot be limited to the appellant. In *re Shea*, 57 Minn. 415, 59 N. W. 494.

Judgment reversed as to the respondent's claim, and a new trial granted as to it.

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T. B. JANNEY and Others v. MINNEAPOLIS INDUSTRIAL EXPOSITION  
and Others.

May 25, 1900.

Nos. 12,102, 12,103, 12,104—(88, 89, 90).

#### Liability of Stockholders—Enforcement by Directors.

Creditors of a corporation, who are also directors, are not debarred from enforcing the constitutional liability of its stockholders for the

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82	7

payment of their debts. But they must in such cases be held to strict proof of their debts and of their own good faith in the premises; for, if their debts were the result of their own wrong or negligence, they cannot be permitted to impose a liability therefor upon innocent stockholders.

### **Purchase of Property of Corporation by Director.**

The relation of directors to their corporation is essentially a fiduciary one, and, upon sound principles of public policy, they are, as a general rule, inhibited from purchasing for their own benefit the property of the corporation, very much as a trustee is disqualified from purchasing for his own advantage the property of his cestui que trust. But where the title, possession, and control of all of the property of the corporation are in an assignee or receiver, who by order of the court, and subject to its approval, offers the property at public sale, a director who has interests to protect may, in good faith, purchase at such sale the property for his sole benefit. The transaction, however, will be jealously scrutinized by the court.

### **Decision Sustained by Findings.**

The facts found by the trial court considered, and held that they sustain its conclusion to the effect that the plaintiffs did not violate their duties as directors of the defendant corporation in purchasing its property at a public sale by its assignee in insolvency subject to the approval of the court.

Action in the district court for Hennepin county to enforce the liability of stockholders in defendant corporation. The case was tried before Simpson, J., who found in favor of plaintiffs. From an order denying a motion for a new trial, certain defendants appealed. Affirmed.

*Hale & Montgomery*, for appellants.

The corporation was not dissolved because of the assignment, nor did it release plaintiffs from their office or duties as directors. 2 Morawetz, Corp. § 636; 5 Thompson, Corp. § 6582; Second Nat. Bank v. New York Silk Mnfg. Co., 11 Fed. 532; G. S. 1894, § 3405. The corporation, by virtue of the assignment did not divest itself of all interest in the property assigned. The assignee simply held the property in trust to be sold for benefit of creditors of the corporation. If no sale had been made, and the assignee had been discharged, the property would have come back to the corporation free from the trust. See *King v. Remington*, 36 Minn. 15.

It was the duty of plaintiffs to see that the assignee properly administered the trust, and that the property should be disposed of for the best interests of creditors. They, acting through the corporation, would have the right to appeal from allowance of claims or of the assignee's account. *Reeves v. Hastings*, 61 Minn. 254; *Kells v. Webster*, 71 Minn. 276. They were under no obligation to bid, and it does not follow that if they had not done so the property could not have been disposed of at some future time for something near its real value. See *Fulton v. Whitney*, 66 N. Y. 548; 3 *Thompson, Corp.* § 4071; *Cook, Corp.* (3d Ed.) § 6539. Plaintiffs' title to the property, being at best only conditional, and held in trust for benefit of stockholders, it was the duty of the trial court to order a resale or to apply the difference between the value as found and the amount paid at the assignee's sale. *Merchants Nat. Bank v. Bailey Mfg. Co.*, 34 Minn. 323; *Arthur v. Willius*, 44 Minn. 409, 412. The court could have ordered a resale at an upward bid above the amount paid by Janney, and allowed the title to stand in him as security, and in case the property could not be sold for more than the amount of his bid, have decreed the property to be in him absolutely. *Hughes, Ex parte*, 6 Ves. Jr. 617.

Plaintiffs are not in a position to urge that no resale could be ordered till the sale be set aside in direct proceedings, since they are in the wrong. Their relation forbade them from becoming purchasers. The rights and equities of the stockholders as against plaintiffs, growing out of such purchase, were not before the court which confirmed the sale, nor involved therein. It is because of this sale that the stockholders have the right to charge plaintiffs as trustees. If the sale were set aside in a direct proceeding, no such rights would exist in this action. *Fulton v. Whitney*, *supra*.

Plaintiffs being directors at the present time, and at the time the debt on which they sue was contracted, cannot recover against the stockholders. Neither the constitutional provision fixing the liability of stockholders, nor the statutes relating to the procedure, contemplate that a director can enforce his claim against stockholders. He is limited to his remedy against the corporation and its property. The word "debts," as used in G. S. 1894, §§ 5905, 5909, does not mean or include debts held by directors against the

corporation. *McDowall v. Sheehan*, 129 N. Y. 200. See *Smith, Com.* 814; *Thacher v. King*, 156 Mass. 490; *Easterly v. Barber*, 65 N. Y. 252; *Knox v. Baldwin*, 80 N. Y. 610.

*Hahn, Belden & Hawley*, for respondents.

A director of a corporation may in good faith become its creditor, and as such director-creditor purchase corporate assets at a bona fide judicial sale to protect his interests as creditor. A sale of corporate property to a director is at most only voidable, and can only be set aside in one of three cases, viz.: (1) Where the corporation itself is grantor or seller, and not in all cases even then. (2) Where the purchasing director is a mere volunteer, having no interest to protect by the sale. (3) Where some element of fraud enters into the transaction. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Saltmarsh v. Spaulding*, 147 Mass. 224; *Jones v. Hale*, 32 Ore. 465; *Lucas v. Friant*, 111 Mich. 426; *St. Joe v. First*, 10 Colo. App. 339; *Preston v. Loughran*, 58 Hun, 210, 214; *Harts v. Brown*, 77 Ill. 226; 3 *Thompson, Corp.* § 4068; *Deane v. Hodge*, 35 Minn. 146; *Oswald v. Minneapolis T. Co.*, 65 Minn. 249; *Mohr v. Minnesota Ele. Co.*, 40 Minn. 343; *Stanly v. Ogden*, 2 Root (Conn.) 259; 3 *Thompson, Corp.* § 4074; *Gridley v. Myers*, 73 Minn. 308; *Farmers L. & T. Co. v. Minneapolis E. & M. Works*, 35 Minn. 543; *Thomas Mnfg. Co. v. Foote*, 46 Minn. 240; 2 *Morawetz, Priv. Corp.* § 787.

The power of the board of directors over the corporate property had ceased at the time of the sale. The sale was made by a public officer (i. e. an officer of the court) under proceedings adverse to the interests of stockholders, and the directors had no means in their hands to prevent the sale. A director could then purchase to protect his interest, if never before. For nearly a year prior, the assignee held the legal title to the property and all the equitable interest of the corporation in respect to it. *Langdon v. Thompson*, 25 Minn. 509. The assignee acted as agent of the court in selling, and simply obeyed its orders, made in accordance with powers conferred by the statute regulating assignments for benefit of creditors. *Dresbach v. Stein*, 41 Oh. St. 70. The title, possession and control of the property, at the time of sale, was in the court by and through its officer, and it was the court that initiated, con-

trolled, and approved the sale. *Thomas Mnfg. Co. v. Drew*, 69 Minn. 69; *Allen v. Gillette*, 127 U. S. 589; *Wilson v. Brookshire*, 126 Ind. 497, 9 L. R. A. 792, note; *McKittrick v. Arkansas C. Ry. Co.*, 152 U. S. 473; *Erschine v. De La Baum*, 3 Tex. 406, 417; *Howards v. Davis*, 6 Tex. 174; *Scott v. Mann*, 33 Tex. 725; *Goodgame v. Rushing*, 35 Tex. 722; *Penny v. Jackson*, 85 Ala. 67; *Fisk v. Sarber*, 6 W. & S. 18; *Chorpenning's Appeal*, 32 Pa. St. 315; *Appeal of Lusk*, 108 Pa. St. 152; *Barber v. Bowen*, 47 Minn. 118. A director cannot be held as sustaining to the transaction any relation more sacred or disqualifying than that of a stockholder. *Re Mabou*, 27 Nov. Scot. 305; *Chatham v. McKeen*, 24 Can. S. C. 348. The appealing defendants are estopped from now questioning the sale, either as to the purchaser or as to the price. They have also been guilty of laches. They make no showing which entitles them to relief. If any one is entitled to demand resale it is the corporation, and not the stockholders. If Janney's purchase is in trust, then it is in trust for the corporation; and it is the only party who could maintain an action against him to reach the same, unless and until a demand has been made upon it to bring such action and it has refused to act. In an action by a stockholder, the complaint must allege that the corporation, upon being applied to, refused to prosecute. *Southwest v. Fayette*, 145 Pa. St. 13; *Greaves v. Gouge*, 69 N. Y. 154; *Flynn v. Brooklyn*, 158 N. Y. 493; *Byers v. Franklin*, 14 Allen, 470. Appellants do not offer to do equity. A director-creditor is not debarred from enforcing the constitutional liability of stockholders. *Oswald v. Minneapolis T. Co.*, *supra*.

START, C. J.

This is an action brought under G. S. 1894, c. 76, by the creditors of the defendant corporation, to enforce the stockholders' liability for its debts. The trial court made its findings of fact and conclusions of law ordering judgment against all of the defendants. Certain defendants appealed from an order denying their motion for a new trial. There is no settled case or bill of exceptions, and the general question to be here determined is whether the conclusions of law of the trial court are justified by the facts found.

The here essential facts are these: The defendant the Minne-

apolis Industrial Exposition is and has been a corporation since November 5, 1885. The management of its affairs was vested in a board of twenty-five directors. The plaintiffs Janney and Nelson have been such directors since the organization of the corporation to the present time; the plaintiff Swift has been such director since 1890; and the plaintiff Donaldson was such director from 1890 until the time of his death, in 1899. Several of the appellants were also directors of the corporation at the time of the sale of its property here in question. The corporation became hopelessly insolvent, and on June 20, 1895, duly made to the Minneapolis Trust Company, pursuant to the insolvency laws of the state, an assignment for the benefit of its creditors.

Such assignee was first, by order of court, directed to advertise for bids for the property, or any part or portion thereof, so assigned to it. But after due advertisement and effort it was unable to effect any sale thereof, except as to two certain lots of land which it was by order of the court directed to convey. As to the main part of the property so assigned, it was unable to and did not receive any bids. Subsequently, by the order of the court, the assignee was authorized to advertise and sell the remaining assets and property so assigned to it at public vendue to the highest bidder. Accordingly the assignee duly advertised and held such sale, but there were no bidders for the property or any part thereof, except the plaintiff Janney, who then was, either in his own behalf or in behalf of himself and the other plaintiffs herein, a bona fide creditor of the corporation to an amount exceeding \$54,948.82. The claim of Janney as such creditor, as well as the entire claim of the plaintiffs, amounting in the aggregate to the further sum of \$25,905.32, had been, prior to the sale, duly proven in the insolvency proceedings, and had been duly allowed. The plaintiff Janney at such sale, in order to protect his interests and the interests of the plaintiffs, did, in good faith, bid for the property at the sale the sum of \$25,100, which sum was the highest and the only sum bid therefor. The assignee duly reported the sale to the court for confirmation and approval, and after a hearing thereon it was duly confirmed by the court, and the assignee ordered to



convey and turn over to Janney the property so sold to him, which was done, he paying the assignee in cash the sum of \$25,100.

The sale was fairly and lawfully conducted, and the amount realized thereat was the highest sum which the assignee was able to obtain for the property. The property so sold to the plaintiffs was, according to the expert testimony, then worth the sum of \$100,000. The answer of the appellants shows that they had notice of the sale and transfer of the property to the plaintiffs, and made no objections thereto, because, as they alleged, the plaintiffs promised that after they acquired the property they would organize a new corporation, and transfer the property to it, so as to liquidate the debts of the defendant corporation. There was, however, no evidence in this case tending to show that any such agreement was ever made by any of the plaintiffs; but Janney, shortly after he so purchased the property, tendered and offered the stockholders of the defendant corporation, by notice duly given to them, that, if they desired and would subscribe for stock in a new corporation to be formed for the purpose of taking the property so purchased by him to an amount necessary to liquidate the indebtedness against the corporation, he would cause the corporation to be organized, and transfer to it the property so purchased by him. Only an insignificant number of the defendant stockholders herein expressed any willingness to subscribe to the stock or to avail themselves of the proposition, and stock in the proposed corporation to the amount of about \$12,000 and no more was subscribed.

It was nearly a year after the sale of the property to the plaintiffs that the appellants first objected to the sale, when they did so in their answer herein, and asked that the plaintiffs be charged with, and be required to account for, the difference between the purchase price paid by the plaintiffs for the property and its value. Their answer also prayed for general relief. The trial court did not find that if a resale of the property was ordered it would bring an increased price, or that there was any reasonable probability that such would be the case, other than may be inferred, if at all, from the value of the property as found by the court.

1. The claim of the appellants first to be considered is that, the plaintiffs being directors at the present time, and such when their

debts were contracted, they cannot recover in this action against the stockholders of the corporation; hence the trial court's findings of fact do not sustain its conclusions of law. Or, in other words, that a director-creditor of a corporation is debarred from enforcing the constitutional liability of its stockholders for the payment of his debt.

Directors must in such cases be held to strict proof of the existence of their debts against the corporation, and of their own good faith in the premises; for, if their debts were the result of their own wrong or negligence in the management of the affairs of the corporation, upon the most obvious principles of equity they cannot be permitted to impose a liability therefor upon innocent stockholders. The cases cited by appellants' counsel (*McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 299, and *Thacher v. King*, 156 Mass. 490, 31 N. E. 648) not only sustain this proposition, but seem, especially the first one, to sustain the claim of appellants as to the right of a director-creditor to enforce the stockholders' liability for the debts of the corporation. But, were the question an open one in this state, we would not be disposed to go to this extent; for where, as in this case, a director in good faith advances money "to supply the ripe wants" and legitimate necessities of the corporation, he becomes its lawful creditor, and justly entitled to the same remedies as other creditors have. Neither the constitutional provision (article 10, § 3), imposing the liability of stockholders for the debts of the corporation, nor considerations of public policy, require or justify a different rule. *Oswald v. Minneapolis T. Co.*, 65 Minn. 249, 68 N. W. 15. The plaintiff in the case cited was a director, and the defendants urged the same claim that is made by the defendants in this case, but it was held that the plaintiff was entitled to enforce the stockholders' liability.

•2. The appellants further claim that, even if it be conceded that plaintiffs may enforce the stockholders' liability for the payment of their debts against the corporation, still the trial court erred in its conclusions of law, for the reason that the court, upon the facts found, ought to have ordered a resale of the property at an upward bid above the amount paid by the plaintiffs, or applied pro tanto upon their debts against the corporation the difference between the

amount they paid for the property and its value as found by the court. This conclusion rests upon the assumption that in purchasing the property at the assignee's sale, pursuant to the order of the court, the plaintiffs violated their duties as directors. If the premises are correct, the conclusion would seem to follow that the stockholders are entitled to some relief if not guilty of laches. But are the premises correct? This question must be answered from a consideration of the special facts of this case with reference to the general principles of law applicable to the rights, duties, and disabilities of directors of a corporation.

The relation between a corporation and its directors is that of principal and managing agents. They are not trustees in the sense of holding the legal title to any of its property for its benefit, or that of its stockholders or its creditors. Still, the relation is essentially a fiduciary one, and upon sound principles of public policy directors are inhibited, as a general rule, from purchasing for their own benefit the property of the corporation, very much as a trustee is disqualified from purchasing for his own advantage the property of his *cestui que trust*. This proposition, upon principle and authority, is unquestionably the law. *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 298, notes; 3 Thompson, Corp. § 4071; 2 Cook, Stockh. § 653. It is, however, equally clear upon principle that where the legal title and control of all of the property of a corporation is vested in an assignee or receiver, in trust for the benefit of its creditors, and the court orders the property sold for the purposes of the trust, a director-creditor, having interests to protect, may in good faith purchase the property at such sale, and acquire thereby the absolute title thereto. Especially is this so where there are other active directors, and the sale is made subject to confirmation by the court, and is approved by it. But in all such cases the director must act in the utmost good faith, for the transaction will be jealously scrutinized. 1 Morawetz, Priv. Corp. § 527; 3 Thompson, Corp. §§ 4068, 4074; *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Appeal of Lusk*, 108 Pa. St. 152.

The facts of this case bring it within the exception to the general rule that directors cannot purchase the property of the corporation

for their own benefit. The title, possession, and control of the property were in the hands of an officer of the court (the assignee), and had been for nearly a year prior to the sale. The sale was made by direction of the court, and subject to its confirmation. The plaintiffs had no control over the property or the assignee, who was the representative of the corporation, its creditors, and its stockholders. They had no power to prevent or control the sale, which was a judicial one, brought about by the court through its officer. They had material interests to protect by bidding at the sale. They purchased in good faith, at the best price obtainable. The appellants had notice of the sale, and did not object thereto until long afterwards. See *Pinkus v. Minneapolis Linen Mills*, 65 Minn. 40, 67 N. W. 643. The sale was fairly conducted, and was confirmed by the court. There were twenty-one directors at the time besides the plaintiffs. These facts justify the conclusion of the trial court to the effect that the plaintiffs, in purchasing the property to protect their own interests, did not violate their duties to the corporation. The facts found by the court justify its conclusions of law.

Order affirmed.



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